

CAI
IA
-2003
F35

3 1761 11556356 1



FIRST NATIONS GOVERNANCE HANDBOOK

A RESOURCE GUIDE FOR EFFECTIVE COUNCILS



Published under the authority of the Minister of Indian Affairs and Northern Development
Ottawa, 2003

www.ainc-inac.gc.ca

1-800-567-9604

TTY only 1-866-553-0554

QS-6167-010-EE-A1

Catalogue No. R2-171/2004E

ISBN 0-662-36400-7

© Minister of Public Works and Government Services Canada

Cette publication peut aussi être obtenue en français sous le titre : *Guide sur la gouvernance des Premières nations – Une source d'information pour rehausser l'efficacité des conseils*

Table of Contents

Acknowledgements	3
Introduction	5
 Part One:	
First Nations Governance Overview	9
The Nature of First Nations Governance	9
The Road to Self-Reliance	10
Authority and Accountability	12
Powers of Chief and Council	16
Key Council Relationships	17
The Tools of Governance	20
The Skills of Governance	21
 Part Two:	
Council Roles and Responsibilities in First Nations Governance	23
Introduction	23
Council's Political Roles and Responsibilities	24
Council's Functional Roles and Responsibilities	26
Council's Legal Roles and Responsibilities	37
 Part Three:	
Council Leadership: The Job of the Chief	43
Introduction	43
Roles and Responsibilities of the Chief	43
The Tools of the Chief	44
Exercising the Chief's Roles and Responsibilities	45
 Part Four:	
Council's Relationship with Community Members	47
Members' Roles and Responsibilities	47
Governance Tools Available to Community Members	48
Involving Members in First Nation Business	49
 Part Five:	
Council's Relationship with the Director of Operations	51
Director's Roles and Responsibilities	51
Tools of the Director of Operations	52
Director's Qualifications	52
Selecting and Supporting the Director of Operations	53
 Part Six:	
Council's Relationship with Indian and Northern Affairs Canada (INAC)	55
The Crown as a Trustee	55
Funding Agreements	55
Trust Moneys	56
Own Source (or Self-Generated) Revenues	57

Part Seven:	Council's Relationship with Other Stakeholders	59
	Aboriginal Organizations	59
	Governments	60
	Other Stakeholders	61
Part Eight:	Council's Legal Environment	63
	Introduction	63
	Constitution of Canada	63
	Federal Law	64
	Canadian Common Law	65
	Quebec Civil Law	66
	Provincial Legislation	67
Part Nine:	<i>The Indian Act</i>	69
	Introduction	69
	Council Elections	69
	Membership	71
	Land Management	71
	Environmental Protection on First Nations Reserve Lands	73
	Estates	73
	Management of Indian Moneys	74
	Governor in Council Regulations	75
List of Figures		
Figure 1:	The First Nation Legal Environment	11
Figure 2:	Structure of First Nations Government	14
Figure 3:	The Key Relationships of Council	18
Figure 4:	The Tools of Governance	20
Appendices		
Appendix A:	Council Governance Policy Manual (selected policies)	77
Appendix B:	General Principles for Establishing Council Committees	85
Appendix C:	Sample Terms of Reference for Establishing a Committee	87
Appendix D:	Indian Band Council Procedures Regulations (BCPR) for the Conduct and Content of Council Meetings	89
Appendix E:	INAC Organization	93
Appendix F:	Governor in Council Regulations	95
Appendix G:	Internet and E-mail Support	97
Appendix H:	Internet Support	99
Bibliography	101

Acknowledgements

Many people helped in the writing of the book. The author, Neil J. Sterritt, building on an earlier draft, worked closely with a project advisory group, the Working Committee. The Working Committee developed guidelines for the project, made useful comments about the text, and provided direction. The Working Committee included:

First Nations Representatives:

MARTIN ASSINEWE, Elder, Sagamok First Nation, Ont.

ANDREW COLOMB, Chief, Marcel Colomb First Nation, Man.

BLAINE COMMANDANT, Chief, Wahta Mohawks, Ont.

HOWARD GRANT, Executive Director, First Nations Summit, B.C.

LLOYD LERAT, Councillor, Cowessess First Nation, Sask.

EMMA PALMANTIER, Consultant, Lake Babine Nation, B.C.

DAVID PAUL, Chief, Northwest Angle #33 First Nation, Ont.

CHARLES SARK, Oromocto First Nation, N.B.

Indian and Northern Affairs Canada Representatives:

BARBARA CRAIG, Director General, Policy, Partnerships and Coordination, Ottawa, Ont.

DAN MURPHY, Acting Director, Environment and Natural Resources, Ottawa, Ont.

JIM HERON, Head, Sustainable Development and Compliance, LTS, Man.

THOMAS HOWE, Associate Director of LTS, B.C.

WENDY PETRUS, Band Governance and Estates Officer, N.S.


STUART SWANSON, Special Advisor, Fiscal Relations, Ottawa, Ont.

HOLLY KING, Senior Policy Analyst, Women's Issues and Gender Equality, Ottawa, Ont.

GRANT BRITTON, Senior Business Analyst, Service Improvement Branch, Ottawa, Ont.

Others from Indian and Northern Affairs Canada (INAC) played important roles at various stages in the development of the book. Les Nord co-ordinated the project in its early stages. Karel Williams, ATSIC Officer (Australia), on exchange to INAC in Ottawa, co-ordinated the project on behalf of Barbara Craig and helped bring it to completion.

Many individuals familiar with First Nations governance took the time to read the manuscript and offer valuable advice. Some reviewed parts of the manuscript at short notice, and kindly provided a response within hours. All offered encouragement. They deserve special mention: Jerry Asp, John Graham, Richard McGuigan, Barry McLoughlin, Larry Nelson, Harold Powell, Victor Robinson, Joe Sanders, Mark Schacter, Diane Smith, Wm. James Sterritt and Neil Westbury.



Finally, a draft of the manuscript was circulated widely, and used in several focus group sessions. Comments by First Nations participants in the sessions helped to structure parts of the book and to make important points more precisely. Our gratitude goes to the leaders and staff of the Carrier-Sekani Tribal Council, the Gitksan Government Commission, and the Association of Iroquois and Allied Indians.

The project was funded by Indian and Northern Affairs Canada.

Introduction

The *First Nations Governance Handbook: A Resource Guide for Effective Councils* deals with how a First Nation Council can be more effective. A Working Committee of First Nations Chiefs and Indian and Northern Affairs Canada (INAC) officials sponsored the Handbook because many newly elected councillors, and chiefs, had expressed a desire to know what their new duties were. While many books describe the roles and responsibilities of leaders and boards of directors, none deal with the special work of First Nations Councils. The Working Committee intends that the Handbook be a useful resource for councillors who would like to build a strong, stable organization in their community.

Governance is the process and structure by which councillors direct and manage Council business. The objective of Council governance is to enhance the well-being of community members and to protect their assets (land, buildings, equipment and money). This includes making sure Council programs and services are accessible and viable.

The key words in this governance definition are the words “structure” and “process.” The business of every organization must be directed and managed. As experienced leaders know, this “...is achieved within a set of rules which create a structure,” and “through a process which involves the parties who have the power to direct and manage the business.”¹ In a First Nation community, the Council directs First Nation business, and the Director of Operations manages it.

Structure

The legal and administrative setting that Council works within create a structure. The structure includes a constitution or by-laws, resolutions, policies and procedures approved by Council, other laws of general application (e.g. human rights laws, labour standards), and community standards. An organization chart depicts the organization’s structure and its “division of powers.”

Process

Process refers to how Council and their Director of Operations make decisions and how they are held accountable.

Objective

Council’s obligation is to set direction and ensure that business is conducted in a responsible manner. Council meets this obligation by considering the values and needs of the community, and by setting a direction that ensures the financial viability of Council business while enhancing and protecting community assets.

¹ Toronto Stock Exchange, Committee on Corporate Governance, “Where Were the Directors?” (1994, p. 7).

The Handbook

The roles and responsibilities of community leaders (e.g. Chief and Council) are set out in the Handbook in nine parts:

Part One:	First Nations governance overview
Part Two:	Council roles and responsibilities
Part Three:	Council leadership: The job of the Chief
Part Four:	Council's relationship with community members
Part Five:	Council's relationship with the Director of Operations
Part Six:	Council's relationship with Indian and Northern Affairs Canada
Part Seven:	Council's relationship with other stakeholders
Part Eight:	Council's legal environment
Part Nine:	The <i>Indian Act</i>

The appendices provide an example of leaders' policies, principles for establishing committees, and other information of potential interest to a Council or councillors who may wonder where they might turn for additional information on leadership issues.


Newly elected Councils may be understandably overwhelmed with their new responsibility. They may have many legitimate questions, such as:

- What are our roles and responsibilities?
- What power and authority do we have?
- To whom are we accountable?
- What skills do we need?
- What tools do we need to do this job?
- What role should our members have?
- What is our responsibility to the Minister of Indian Affairs and Northern Development?
- Does the *Indian Act* affect how we do our job?
- What are the roles and responsibilities of INAC?

This guide is designed to help new councillors find answers to these questions. Also, given the many changes in the relationship between Aboriginal people and governments – at the constitutional level, in law, and through devolution – it may also be of value to experienced councillors and community members.

The document does not address the specific situation of every First Nation. The information is meant to be a general guide that needs to be adapted to the requirements of individual communities. Culture, tradition, size, complexity, location, experience, available resources and the wishes of the community are factors that will determine the resolution of the issues described.

Where material in this guide refers to the *Indian Act*, the terms “Band,” “Band council,” and “Indian” are used because the *Indian Act* defines them. Otherwise, the term “First Nation” is used when referring to an Aboriginal community. Also, the word “Council” generally refers both to Chief and Council, and the chief administrative officer is called the “Director of Operations.” These words are used for purposes of clarity and consistency within the document, not with disrespect for other words commonly used today. In addition, the words “he” and “she” are used interchangeably and should be taken to mean “he or she.”



Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

<https://archive.org/details/31761115563561>

First Nations Governance Overview

THE NATURE OF FIRST NATIONS GOVERNANCE

All responsible governments are concerned with the well-being of members and the wise use of land and resources. Successful governance requires leadership, experience and discipline. Traditional Aboriginal governments evolved, and they were responsible and effective. Otherwise, they would not have survived and thrived before the arrival of Europeans.

*Good governance –
the basis of self-government.*

While differences exist in government systems, this document is concerned with the similarities. At the broadest level, all governments fulfill certain needs, deliver services, and are accountable to their members.

Every society has a right to change – to evolve its legal institutions and governments. Before Confederation, First Nations altered the form and structure of their government based on relationships with other First Nations. Iroquoian governance influenced aspects of American governance. Some First Nations, influenced by European governance, freely altered aspects of their tribal governance.

After Confederation, however, Parliament created a dilemma for Aboriginal people. First, it passed legislation designed to alter traditional tribal organization by providing for leadership elections. Second, it made these elected Chiefs accountable to the Minister, rather than to their members.² Although government has amended the original legislation several times since 1869, its legacy endures. The resulting problems for Aboriginal people include:

- insufficient power and jurisdiction
- excessive government controls
- unclear lines of authority and accountability
- inadequate funding and training
- lack of enforcement mechanisms
- confusion about the impact of provincial laws
- confusion about leaders' roles and responsibilities
- confusion about governance matters

A century of dependency resulted in frustration and despair for Aboriginal people. Thus, the challenge for Aboriginal people is not only to gain more control over their own affairs, but to find ways to make control meaningful.

² An Act for the Gradual Enfranchisement of the Better Management of Indian Affairs, 1869 (LRT Review, Phase II Final Report, First Nations Law, July 19, 1989, p.8).

Self-government – an objective today of many Aboriginal leaders and community members – is an important notion. Self-government and governance are connected ideas. While self-government means having “*jurisdiction or control over their political community*,” governance is “*the means (process and structure) by which First Nations exercise that jurisdiction or control*.”³

Self-government, of course, implies mandates and jurisdiction with respect to members, land and resources. Governance is having the structures and processes in place for sound decision-making and accountability to members. Good governance, therefore, is essential to self-government. In fact, one might consider good governance as the basis for self-government.

THE ROAD TO SELF-RELIANCE

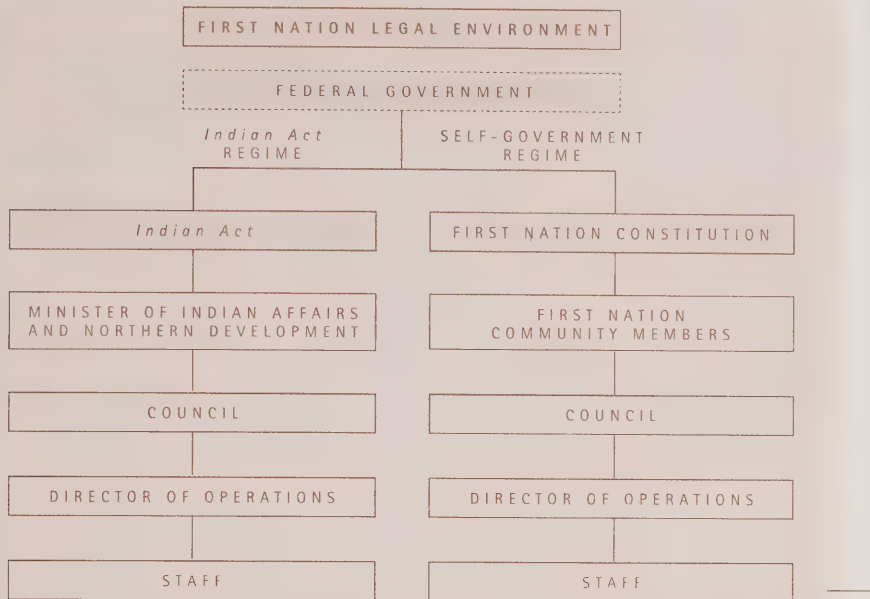
Realistically, First Nations cannot turn back the clock to the freedom their ancestors had. Self-government today will depend on their political actions and on what they can achieve at the negotiating table with the Canadian government. But First Nations can be self-reliant and self-determining. Governance, therefore, will not only involve being knowledgeable about leaders' roles and responsibilities, but also the legal framework within which First Nations work. Meanwhile, most First Nations have a definable starting point: their leaders derive power and authority both from their members and from the *Indian Act*. By understanding the nature of their dual authority, and by making full use of it, Councils can fulfill the short- and long-term needs of their members.

In the pursuit of self-government, successful First Nations will divest themselves of the *Indian Act*. First Nations that make the transition, by treaty or other means, will become accountable, politically and legally, to their members. As the budget of a First Nation involves millions of dollars in loans, grants and contributions, community members, funding agencies, financial institutions, suppliers and business partners expect Chief and Council to work within a legal framework. While the *Indian Act* regime provides somewhat of a governance framework for many First Nations now, a First Nations' charter (constitution or by-laws) can do so in the future. A First Nation constitution, therefore, which replaces the *Indian Act*, will define the legal relationship between members and their leaders (see Figure 1).

The figure below shows that First Nation Councils are currently accountable to the Minister of Indian Affairs and Northern Development. Under a First Nation constitution they will be accountable to their members. It also shows that First Nations will be subject to the laws of Canada even when not under the *Indian Act*, as federal or provincial laws regulate all governments and organizations.

³ Funk and Wagnalls (1989, p. 578).

FIGURE 1: THE FIRST NATION LEGAL ENVIRONMENT



The *Indian Act* defines just one of the relationships Aboriginal peoples have with the federal government. Once used to overcome Aboriginal peoples, the *Indian Act* is now one of several ways by which to ease them into Confederation through self-government. This was not the case before 1981. Since the *Constitution Act, 1982*, the political, legal and constitutional efforts of Aboriginal leaders have dramatically altered federal government relations with First Nations. This is evident in the various processes available to Aboriginal people – constitutional, treaty, self-government and the courts.

The *Indian Act* is silent with respect to many of Council's governance relationships. Thus, some leaders view the *Indian Act* as a blessing because its silence allows them to tailor their governance approach to their own culture and traditions. Also, it allows leaders to develop their charter or constitution without the legal constraint of the *Indian Act*.

Up to the 1980s INAC had direct control over funding and was heavily involved in service delivery at the First Nation level. Today INAC transfers more than 80% of its funding directly to First Nations communities for the delivery of programs and services intended to improve community well-being. It is also using funding arrangements that provide increased local decision-making authority and accountability to First Nations. In the wake of this transition, INAC's role has become that of a funding agency, rather than a service provider. First Nations' Councils are thus assuming governance roles and responsibilities similar to other levels of government in Canada.

AUTHORITY AND ACCOUNTABILITY

he assets of the community
belong to all members.
Therefore, members are
owners (collectively), and
leaders are trustees.

Council's Trust Relationship with the Community

In democratic governments, members of the community are the source of power and authority for their political leaders. While this is also true for Chief and Council, some community members may not realize why. It is partly because the assets of the First Nation belong to all members collectively. In other words, they are the owners, or shareholders, of those assets.

Managing the complex business affairs of the First Nation is impractical for the members. Community members, therefore, select a smaller body – the Council – and trust them to look after their interests. By definition, Chief and Council are trustees, and have a fiduciary responsibility to act in the best interests of all members. Chief and Council are not a power unto themselves. Community members delegate political power to them.

This, at least, is how Council is supposed to work. In fact, the *Indian Act* plays a basic role. First, the *Indian Act* sets out the process by which the leaders of section 74 “Bands” are elected. Secondly, all First Nations, “custom Bands” included, get their legal powers with respect to many governance issues from the *Indian Act* (e.g. Council's by-law making powers).

Nevertheless, community members have an important role in governance. From a community point of view, members and councillors should view the *Indian Act* as aiding leadership selection, but not directly altering their fundamental “owner - trustee” relationship.

Accountability

Given the above, Chief and Council have a dual responsibility to their members. First, Council is responsible for the day-to-day management of service and benefit programs and the wise use of financial resources at its disposal. This is called Council's “*management accountability*.” Also, given the nature of its legal/financial arrangements with the federal government, management accountability includes Council's responsibility for the administration of public and trust funds following agreed terms and conditions.

Second, Council is responsible for providing “good government” over a broad range of purposes that affect community well-being. This is called “*political accountability*” since Council, in carrying out these purposes, is expected to conduct itself by standards that echo the will of community members.

Members hold their leaders accountable by asking questions. This is their right and responsibility. Similarly, leaders who understand their trustees' role, and conduct themselves accordingly, welcome the participation of members and readily make themselves accountable for their actions. In short, accountability supports the community in meeting its needs and objectives. Also, accountability helps prevent the abuse of power by those who hold positions of trust and authority.

Chiefs and Councils may also find themselves being held accountable for matters over which they do not have control. In such situations it is still important to answer the question by painting a picture of the larger environment within which the current Council is operating. However, the answers must be clear, or it will seem the Council is ducking its accountability. Therefore, Chiefs and Councils need a good understanding of their roles and responsibilities, their operating environment and their relationship with other parties.

Principles of accountability were as important for traditional Aboriginal governance as they are in today's complicated society. Accountability principles evolved to ensure a public voice in the governance process. Much of Councils' business involves the distribution of benefits or provision of services to selected individuals or groups. Since today's benefits and services must often meet certain complex eligibility criteria, structured and well-defined principles contribute to a climate of fairness, equality and impartiality.

Three principles – *transparency*, *disclosure* and *redress* – are the foundation upon which governments build political and management accountability. Each principle is defined below. Readers should view the principles as a guide: first, for members and leaders to decide the extent to which their own accountability framework meets the standards adopted by other governments; second, to identify gaps in their own particular accountability framework. The application of these principles is a matter of local concern and will vary depending on community circumstances, customs and traditions.

Transparency

Transparency involves defining and documenting First Nations operations with a particular focus on three areas.

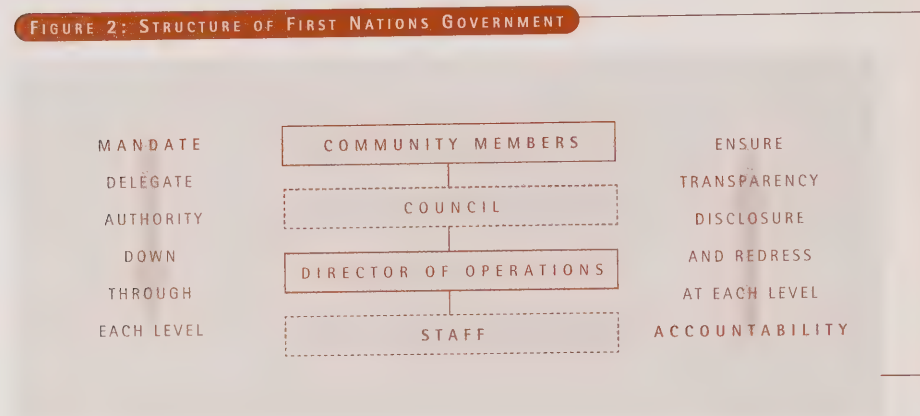
The Structure of First Nations Government

A clear description of how to structure a government to reach its goals helps Councils know who is accountable to whom (Figure 2). Defining the roles, responsibilities and decision-making authority of individuals within the organization is key to management and accountability.

Transparency is the process by which government explains and documents how it conducts its business. A "transparent" government is open for observation and scrutiny by the people.

While Council, collectively, has the legal authority to act, the roles of the Chief and individual councillors may differ. Defining their respective roles and responsibilities is vital to good governance and accountability. Some communities have defined the roles and responsibilities of Chief and Council in First Nation constitutions. Others have used the by-law provisions of the *Indian Act*, or written policies (also called community rules, codes or public administration policies), to explain their functions.

FIGURE 2: STRUCTURE OF FIRST NATIONS GOVERNMENT



An organization chart shows how authority is delegated downwards, and accountability moves upward. It structures Council’s decision-making process. The decision process, which will include conflict of interest rules and codes of conduct, should be defined for and observed by each level of the organization.

Program and Service Delivery

Governments deliver, to individuals or groups, a range of programs and services. Since programs and services often have complex criteria, governments develop policies and procedures to direct the management of staff, budgets and capital assets. Thus, appropriate policies and procedures help Council meet its “transparency” requirements.

Policies help maintain community values of fairness and equality, and protect group and individual rights. Applying policies fairly and consistently gives comfort to community members. Governance without policies fosters uncertainty and turmoil for members, leaders and staff.

When contemplating policies for program or service delivery, Council should determine:

- The range and scope of services and benefits to be delivered
- Minimum standards required by contract or statute
- Eligibility requirements for potential recipients of benefits or services
- Conditions for continuing to receive services
- Whether Council’s policies and procedures contain clauses dealing with fairness, equality and impartiality

Decision-making

While the *Indian Act* deals with Council and community decision making, it omits several major areas – for example: borrowing money for community purposes, delivering community programs or services, major development initiatives, and the annual budget/expenditure process. The *Indian Act* is very much concerned with decision making, but focuses primarily on the legal relationship (powers and authorities) between the Minister and Council. For the most part, it is silent about the relationship between Council and their community members on key governance matters. This is not by accident. Archaic as the *Indian Act* may be, it was never the intent to regulate decision making between Council and the community nor with external parties. However, the *Indian Act* also did not anticipate First Nations managing complex multi-million dollar programs or engaging in a broad range of economic activities.

Most communities by custom and tradition want formal community involvement and approval for major decisions that affect members and external parties. Despite Council's authority to act, community members should have a say about important issues. Such discussion must consider internal community issues and relationships with external parties. Developing a suitable way to involve First Nation members in community decisions takes time. Successful procedures, once identified as policies, should survive changes in leadership.

Disclosure

Disclosure of information to community members and stakeholders is critical to accountability in three important respects. First, it is a major force in building an atmosphere of trust and confidence in the government, and it enables community members and stakeholders to make informed assessments about how well things are going and whether or not they need correction. Secondly, open disclosure in the workplace is fundamental to “management accountability.”

Finally, arriving at solutions to major governance issues involves the co-operative efforts of more than one government, whether it is First Nation to First Nation, or between First Nations and the federal or provincial/territorial governments.

Disclosure of information about Council business is best when it is regular, predictable, and when people know when and where to get the information they need about business conducted by Council for them. Thus, informed sharing of information between the parties involved promotes economies of scale, growth and trust.

Redress

Redress mechanisms take many forms. Here, redress is discussed from two perspectives only.

Through disclosure, the government sets up mechanisms and processes to ensure information is available to the community about its operations, objectives, plans, initiatives, performance and community issues.

For redress, the government sets up formal rules and appeal procedures for governance functions that will affect the rights of individuals or the community.

Leadership Selection and Election Appeals

In a democratic system, elections are the ultimate means of redress. Regular elections allow First Nation members to install or remove their leaders, following procedures set out under s.74 of the *Indian Act*. With election by Band custom, the Council needs to establish:

- A formally documented election/selection process
- Procedures with respect to:
 - Who may vote
 - How voting is conducted
 - Appeals
- Formal rules for the succession of leaders
- Community support for the process

Also, Council and community members should be aware that the *Indian Act* contains a form of redress in its election appeal rules.⁴

Administrative Reviews and Appeals

When delivering programs and services to community members, disputes and misunderstandings are bound to occur. The primary objective of administrative reviews and appeals, therefore, is to ensure fairness, and obtain closure, for disagreements.

Most governments seek to resolve conflict by having a written appeal process for individuals or groups who feel they have been wronged. For example, a wronged person (staff or community member) could take her concern first to the staff level, then management, Council, third party mediation or the courts.

Typically, however, an individual who skips levels of appeal (e.g. going directly to court) may have waived his right to Council's appeal process.

POWERS OF CHIEF AND COUNCIL

Excepting unusual circumstances, most organizations expect their leader or chairperson to act on "board" decisions, not unilaterally. Many Councils have guidelines for the Chief to follow when deciding in exceptional situations. Councillors exercise their powers in a duly convened meeting with a quorum present.⁵ The *Indian Act* is typical in this regard. It confers power on Council as a collective body, in other words, to the Chief and councillors as one. Individual members of a Council, including the Chief, have no power to act alone when deciding for the First Nation.

⁴ Imai. 2000 *Indian Act and Aboriginal Constitutional Provisions*, Carswell (2000), pp. 201-2.

⁵ See Appendix C for a quorum under the *Indian Act*.

For the most part, councillors of “custom Bands” are subject to the *Indian Act*, and hence derive some of their powers from it. Whatever the method by which a community chooses its leaders, they become trustees, with delegated powers. Therefore, a clearly defined governance standard for all First Nation Councils should be developed. It is in the interests of all First Nations that this be done, but especially custom First Nations. Nevertheless, it is important to be clear that the only parts of the *Indian Act* and regulations that do not apply to custom Band Councils are the Indian Band Election Regulations and Indian Band Council Procedure Regulations.

Custom First Nations could look to the *Indian Act* to define the powers they wish to delegate to their leaders. Also, the law as decided by the courts, not only for First Nations, but for national and local governments, corporations and non-profit organizations, provides another source of information on powers, roles and responsibilities of Councils.

Much (but not all) of Council’s work is “board-like.” Since virtually all “boards” have a trustee relationship with their members or owners, the principles of good governance are reasonably consistent. Authors have written many books in recent years on the subject of governance. These books provide information about governance standards that Councils may find helpful. In exercising their powers, councillors collectively have five important governance roles to fill.

- Representative Role
- Policy-Making Role
- Monitoring Role
- Political Role
- Law-Making Role

Council’s five key governance responsibilities include:

- Overseeing strategic management
- Hiring and directing the Director of Operations
- Maintaining good relations with the members
- Protecting community assets
- Fulfilling fiduciary and legal responsibilities

These roles and responsibilities will be discussed in Part Two.

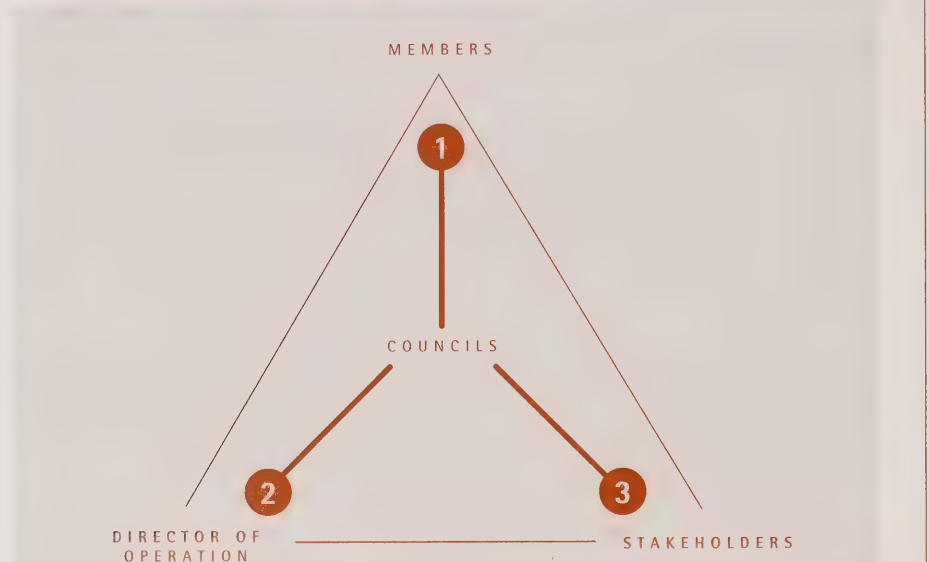
KEY COUNCIL RELATIONSHIPS

Understandably, newly elected Council members may wonder what their job is as community leaders. Being knowledgeable about their key working relationships – both external and internal – may demystify the job and help councillors overcome some of their initial worries.

Council's External Relationships

Council is at the decision centre of a political arena with three fundamental external relationships to be concerned about: members, the Director of Operations, and other stakeholders (see Figure 3).

FIGURE 3 : THE KEY RELATIONSHIPS OF COUNCILS⁶



For political and administrative reasons, there is a natural tension between Council, the community members, staff and the stakeholders group. The basic issues become who controls Council, for what purpose, and in whose interest? Citing governance authorities Leighton and Thain:

The central issues of governance arise from conflict among these three groups, all linked in complex... political bargaining relationships that are ultimately refereed and arbitrated by the board... In the fundamental conflicts of interest among directors, shareholders, managers and stakeholders, who decides who gets what, why, how, when, and from whom?

What is the job, authority, and responsibility of a director? Who hires, evaluates and, if necessary, fires the CEO [Director of Operations]? On what grounds? These basic issues are inescapable for any director seriously involved in board governance.⁷

While Leighton and Thain are talking about boards of directors, their argument applies equally to First Nations Councils.

⁶ Adapted. See Leighton and Thain, 1997, Exhibit 3.3, p. 43.

⁷ Leighton and Thain. *Making Boards Work: What Directors Must Do to Make Canadian Boards Effective* (McGraw-Hill), 1997, pp. 42-3.

The key element of an organization is not a building or a set of policies and procedures; organizations are made up of people and their relationships with one another. (Daft, 1998, p. 11)

Community Members

The nature of the relationship between Council and their community members is important. Since the assets of the First Nation belong to the members collectively, they may be considered “owners” or “shareholders.” Expecting members to govern or oversee the complex business of the community, however, is unrealistic. Members delegate, or entrust, that job to a representative body, Chief and Council. This means Council’s relationship to its community members, in fact, is that of a trustee, with a trust-like responsibility to act in the best interests of all members.

The Director of Operations

Besides its members, Council has a crucial relationship with management (the Director of Operations). Governance is many things, but it is not day-to-day management. Council must have a competent person manage its business and supervise its employees. The Director of Operations, as its principal employee, is accountable only to Council. Therefore, the task of hiring the right person for the job is crucial.

Stakeholders

Stakeholders include all persons or groups who have an interest in, or are affected by, the actions or decisions of Council: employees, middle-management, suppliers, special interest groups, banks, and governments. Apart from the members, a significant Council-stakeholder relationship, by virtue of the *Indian Act*, is with the federal government. Many Councils work with provincial, municipal and regional governments. They are considered stakeholders as well. These relationships will be discussed in Parts Five and Six of this guide.

Council’s Internal Relationships

An important relationship to manage and develop is that of the councillors’ internal relationships with each other, and the Chief. Council will better manage its external relationships if it works as a team. To be effective, players on sports teams, like lacrosse or hockey, have different, but complementary, skills and play different roles. First Nation members expect Chief and Council to work in much the same way.

After each election, Council should set aside time to determine how each member can best contribute to Council work. Naturally, the Chief councillor is the leader of the Council team and will have a different role than councillors. Understanding and exercising their different roles can make for a very strong working relationship to everyone’s benefit. The complementary roles of Chief and Council are discussed in Part Two.

A stakeholder is any group within or outside an organization that has a stake in the organization's performance. (Daft, 1998, p. 64)

An organization exists when people interact with one another to perform essential functions that help attain goals. (Daft, 1998, p. 11)

THE TOOLS OF GOVERNANCE

Following every election, First Nations members often have high expectations of Chief and Council. They may expect Council to satisfy unreasonable problems and needs. Some young, less-experienced councillors may believe they can fulfill such needs. However, the needs and problems confronting most First Nations today would challenge the board of directors of any large corporation.

Determining and fulfilling the reasonable expectations of community members is difficult enough. Every job, large or small, requires special tools and skills. Properly using and applying their tools and skills helps councillors meet their members' needs. Similarly, First Nations members need to delegate power to their leaders appropriately, and manage that relationship properly. Therefore, members also need to be aware of the tools that help them do their job (Figure 4).

FIGURE 4: THE TOOLS OF GOVERNANCE

LEGAL & FUNCTIONAL FRAMEWORK	COMMENT
A. LAWS OF CANADA	MEMBERS, COUNCIL, STAFF AND STAKEHOLDERS HAVE ACCESS TO THE COURTS FOR GRIEVANCES AND REDRESS.
B. CONSTITUTION AND BY-LAWS	DEFINE THE LEGAL STATUS OF THE ORGANIZATION AND THE EXPECTATIONS MEMBERS HAVE OF THEIR LEADERS.
C. MINUTES OF MEETINGS	AS THE LEGAL RECORD OF COUNCIL MEETINGS AND ACTIONS, THE MINUTES GIVE VOICE TO THE CONSTITUTION OR BY-LAWS.
D. LEADERS' POLICY MANUAL	DEFINES THE ROLE AND FUNCTION (JOB DESCRIPTIONS) OF CHIEF AND COUNCIL, THEIR RELATIONSHIP WITH THE MEMBERS AND STAKEHOLDERS, AND THE JOB OF THE DIRECTOR OF OPERATIONS. CONTAINS LEADERS' PURPOSE AND GOALS.

Tools of governance are important because Council uses them to justify their actions, or to deal with problems or conflict. For example, a disgruntled community member may disagree with an action of Council. Council can use any of the tools of governance to justify or defend its action, depending on the nature of the problem, and assuming Council acted properly. Also, if Council acted improperly, community members can use the tools of governance to resolve an issue. Confusion, or anarchy, results when councillors and community members ignore each other's rights, or when people do not know how to use the tools of governance.

THE SKILLS OF GOVERNANCE

Councillors spend nearly all their time in meetings dealing with issues and problems. Good Council meetings result in decisions and recommendations that improve the interests of community members. Too often, however, Council meetings are lengthy and do not result in decisions. Sometimes members bring staff or community conflicts to Council. Resolving conflict is difficult. Staff grievance and conflict resolution processes help Council do their job.

New or inexperienced councillors need skills and processes to deal with difficult situations when they arise. Having each councillor learn all the skills listed below is unnecessary. Individual councillors should pursue skill development in their area of interest. In this way Council gets a range of complementary skills with which to do its job. Useful skills include knowing how to:

- Run good meetings
- Solve complex problems
- Make good decisions
- Deal with grievance and conflict
- Plan

The skills of Council are not discussed in this Guide. Instead, councillors should consider participating in the various workshops and courses offered by professionals, management schools (Banff, for example), and private institutions.

Council Roles & Responsibilities in First Nations Governance⁸

INTRODUCTION

Community members grant power to an elected Chief and Council to govern the land and property of the First Nation for them. Councillors, including the Chief, thereby assume responsibility for program and service delivery, financial management, policy development, and planning and control systems.

As the elected representatives of community members, Chief and Council are the authorized First Nation government. As such, they have roles and responsibilities beyond those of an ordinary member. For example, councillors have a fiduciary responsibility always to act in the best interests of the First Nation, and always to use First Nation resources equitably for the members' benefit. Failure to do so can result in personal liability being assessed against an individual councillor, or the whole Council.

Councillors as Trustees

Most Aboriginal people are aware that the federal government has a fiduciary (trustee) relationship with First Nations. This special relationship arises partly because the federal government holds First Nations assets "in trust." In law, however, any person who has decision-making authority concerning the assets of another is considered a trustee. Since councillors oversee the members' assets, they too are considered trustees. This is the unique legal base for the work of Council.

The question is, "Where does Council's responsibility end, and a councillor's personal responsibility begin?" Politicians in senior governments usually allocate resources based on public demand (e.g. job creation this year, daycare the next), but do not administer the program. Some large Councils have the resources to organize properly. Most Councils often make, oversee and interpret or adjudicate their own policies, if they have a policy process. Unfortunately, some Councils lack the resources or experience to organize effectively.⁹

Generally, Council's job is to ensure that the First Nation achieves its purpose and goals. The job may require that Council overcome a range of problems, including scarce human and financial resources, and workers having less than minimum skills or experience.

A role is a set of expectations about how a person in a given position in a social system should act.
(Leighton and Thain, p. 209)

Responsibility – being "answerable legally or morally for the discharge of a duty or trust." In other words, being responsible means being accountable.

⁸ As before, the term "Council" includes the Chief, unless context indicates otherwise.

⁹ West Moberly First Nation, Roles and Responsibilities Workshop, Feb. 2000.

From a governance point of view, the *Indian Act* is incomplete to the extent that it establishes a legal relationship (powers and authorities) between the Minister of Indian Affairs and Northern Development and the First Nation Council, but not with community members. On this fundamental governance issue it is almost totally silent.

Irrespective of the *Indian Act*, Council is responsible for the governance of the community, its own governance and to govern the First Nation administration. In all of its actions, Council has a fiduciary responsibility to act in the best interests of the First Nation. For example, Councillors cannot spend First Nation moneys for their own benefit, and would be personally liable to the First Nation if they did. A Member of Parliament or a provincial legislature would be similarly liable if he or she used public funds for personal purposes.

Council must act according to all applicable laws or run the risk of having its actions invalidated. Acting against applicable laws will expose the First Nation to liability or public scrutiny. Depending on the issue, applicable laws may be the laws of the First Nation, federal or provincial laws. Taking into account the legal consequence of an action by Council is important (e.g. for firing an employee without cause).

As trustees, members expect Council to protect the assets of the First Nation, and to wisely manage its financial affairs. Council's responsibility is always to act in the best interests of the community. Failure to honor these responsibilities harms the community's ability to control its own affairs.

The responsibilities of most boards of directors fall into two categories: *functional* and *legal*. First Nation Councils are unique, however, in that their responsibilities fall into three categories: *political*, *functional* and *legal*. These responsibilities are discussed below.

COUNCIL'S POLITICAL ROLES AND RESPONSIBILITIES

Overall, Council's political role is to represent their members' interests, to be advocates, and to have an open personal and professional working relationship with them. While its political responsibilities may seem more complex, a Council that consciously works to enhance its representative, advocacy and public relations roles will have done much to remove the mystery of this part of their job. By doing so, Council will be more likely to win the respect and support of its membership. We discuss these issues below.

Council's Representative Role

Council's representative role has two features. First, councillors are elected (or selected) by First Nation Members to represent their views and interests as much as possible when dealing with First Nation business. Secondly, election to office requires councillors to have a broader understanding of First Nation issues than the members. Community members may have conflicting interests and needs. Recognizing this, councillors often have to make unpopular decisions. This requires that councillors have good judgement and that they think about the community's best interests, not just those of special interest groups.

In their representative role, councillors have dual accountability. First, they are accountable to First Nation members for their actions. Secondly, their actions reflect community views and values to stakeholders external to the reserve community. In other words, the credibility of councilors bears on the reputation of the entire community.

As community leaders, councillors deal with inquiries from members that may lead to the investigation, and possible resolution, of an important issue. The issue may be significant and require the personal attention of their elected representatives. Council members should listen to their members' views, but should not create the impression or expectation they can resolve the issue alone. Councillors are expected to bring important issues to Council for discussion. By pursuing relevant issues, councilors can gain the confidence of members and build a successful First Nation government.

Councillors cannot do all that members expect of them. They must develop an infrastructure and processes to deal effectively with community concerns. A key component in Council's infrastructure is the Director of Operations. Council decides issues in the form of Council policies. The Director acts on Council decisions by implementing their policies. Policies are Council rules that allow Council and the Director to deal with issues consistently. This allows Council to deal with the important, long-term needs of the community, while the Director of Operations deals with the details of daily management and administration.

Council's Advocacy Role

As leaders, councillors become advocates for community needs and concerns. This means councillors sometimes have to lobby or negotiate agreements with other levels of government, or participate in regional, provincial or territorial meetings with other Aboriginal organizations.

Many interest groups seek the participation of First Nations leaders. Alternatively, environmental issues, wildlife management, and industrial development affecting First Nation Members and First Nation reserve lands require the attention of Council.

Such demands pose challenges for Chief and Council because Council's time and resources are limited. Council can alleviate the stress of conflicting demands by setting its own goals and priorities, and by delegating some of its work among councillors and with the Director of Operations. Failing to plan its political agenda usually results in Council following another's agenda, to the detriment of programs and services for First Nation Members. Occasionally, Council should review its activities to ensure that councillors are concentrating on the needs of community members and that councillors are working within their mandate.

Council's Public Relations Role with Members

Since Chief and Council are trustees for the membership, they must communicate regularly with the members, listen to the members' views and wishes, and report progress and financial condition to the members. The best protection for both the community and Council in fulfilling its fiduciary obligations is to:

- Maintain good communications so the members are aware of the key issues Council is dealing with
- Ensure Council consults with the community on important decisions

Council can meet this responsibility by opening Council meetings to members, having frequent (quarterly) community meetings, and by issuing newsletters or information circulars. In addition, although not acting officially, the Chief, individual councillors and the Director of Operations should be prepared to listen to opinions and concerns when they meet community members.

COUNCIL'S FUNCTIONAL ROLES AND RESPONSIBILITIES

Introduction

Council, in fulfilling its obligations, has roles and responsibilities beyond those of an ordinary First Nation Member. Its specific contributions are unique to its role and necessary for its and the First Nation's proper governance. Council has the following functional roles and responsibilities:

- Setting strategic direction
- Hiring and supervising the Director of Operations
- Protecting and optimizing community assets
- Making Governance Policies
- Monitoring the effective use of staff, committees and advisors
- Overseeing financial matters
- Overseeing service programs
- Meetings, minutes and decisions

These are discussed below.

Overseeing Strategic Management

Council's first responsibility is to decide what it intends to do during its term of office. Unless it has goals and priorities, Council and its administration will lack a sense of direction. Chief and Council must therefore define their purpose, goals and priorities soon after election. An experienced Director of Operations, or an external facilitator, can help with this important task, but Council must do it. The result of this activity will be Council's strategic plan.

Council delegates implementation of its strategic plan to the Director of Operations. Council then oversees the achievement of its goals and priorities by managing the Director. By understanding, monitoring, evaluating, controlling and guiding what management does, Council fulfills its strategic management responsibility. By ignoring its strategic management responsibility, Council may not understand the extent of its fiduciary obligations. An orientation program should help new councillors gain an understanding of this and other aspects of their trustee role.

Hiring and Supervising the Director of Operations

It is critical that Council develop, empower and oversee the best Director of Operations available. It is worth Council's time and effort to hire an honest, ethical person with at least the minimum skills and experience for the job. By checking references, asking the Director of Operations to be bonded, and putting him on probation, Council helps ensure it is hiring a competent, trustworthy person. Much to their regret, examples abound of Council's having hired deceitful or fraudulent Directors by failing to check their references, or asking them to be bonded.

Once hired, Council must exercise "due diligence" by regularly monitoring and evaluating the Director of Operations.¹⁰ Having an Employee Performance Agreement, which defines the employee's accountability to Council, is wise. If not vigilant, Council may eventually lose control of the Director of Operations, or he may resign in favor of a healthier working environment. Since carrying out goals is left to the Director, Council should ensure the Director is involved in developing strategic direction. If the Director is doing well, Council should let the Director know. If the Director is not doing well, Council should evaluate the Director. If the Director's performance is unlikely to improve, Council should dismiss the Director and hire a new one.

Protecting and Optimizing Community Assets

As agents for community members, Council is responsible for approving all major capital expenditures, acquisitions and investments. Much of this responsibility is fulfilled when Council approves the annual budget. However, priorities may change and emergencies may occur, which could affect the original financial plan. If so, Council must formally alter the original plan in a duly convened meeting.

Strategic management is a systematic process for planning and implementing the decisions and action necessary to ensure success.
(Leighton and Thain, 1997, p. 115)

Council establishes a strategic plan and *monitors* its implementation. The Director of Operations *implements* the strategic plan.

¹⁰ Due diligence requires Council, or individual councillors, to ask appropriate questions, seek objective professional advice, and not act on an issue when there is reason for concern, or doubt, about its outcome.

Council should ensure equipment is properly maintained and adequately insured. Competitive bids need to be obtained when acquiring equipment. All investments must be secure. First Nation assets include land, natural resources, money, facilities on reserve, the intellectual property (elders' histories, etc.) of the First Nation, etc.

Here Council, with the Director of Operations, should develop policies that guide the leaders and staff in following appropriate procedures to safeguard all First Nation assets. The policies should include procedures by which Council monitors, evaluates and approves environmental responsibilities, business plans and evaluations, financial reports, and occupational health and safety regulations. Further, Council should ensure that their policies and procedures are consistent with their legal requirements.

Making Governance Policies

Meeting Council's governance responsibilities is accomplished through a leaders' policy framework. Policies provide direction for the proper operation of the First Nation. This is a key responsibility of Chief and Council.

Leaders' Policy Framework

Council has two types of policy to be concerned with: leaders' policies, and staff policies and procedures. The Director of Operations is responsible for developing staff policies and procedures while Council, with the help of the Director of Operations, develops its own set of leaders' policies. Leaders' policies help the Director, and councillors, meet their responsibilities properly and consistently.

All leaders' policies are important and deserve much of Council's time and attention. Well-developed policies are critical, because they create the appropriate environment for the work of Chief and Council and of the Director of Operations.

Developing Council Policies

Besides developing legislation through by-laws, Council has an important responsibility to create and follow its own leadership policies. This Council responsibility is often misunderstood because most people think of the policy process as "staff policies and procedures." However, as one governance authority wrote, leadership policies

*... offer the opportunity to think big and to lead others to think big.
... Because policies dominate all aspects of organizational life, they
present the most powerful lever for the exercise of leadership.¹¹*

¹¹ Carver, *Boards That Make a Difference*, 1997, p. 25.

Carefully developed Council policies give meaning to First Nation legislation and by-laws. Thus, all First Nations communities need a policy framework within which to work. A typical policy framework should include the following Council activities:

- Planning (i.e. Council's purpose, values and goals)
- Leading (i.e. councillors' relationships with each other and with the membership)
- Organizing (i.e. Council's relationship with the Director of Operations)
- Controlling (i.e. limits on the Director of Operation's authority)

Although a framework based on these four categories will be extremely useful, Council needs to anticipate problems in the "grey" areas. A good policy framework recognizes the need for common sense and flexibility by those applying or interpreting the policies. For example, what happens when a community member complains to a councillor, or the Chief, that a staff decision based on a policy is unfair? How does the councillor respond when only Council can overturn the decision? A solution, perhaps, is to ensure that a reasonable appeal process is in place for such situations. A councillor could be designated as Council's ombudsperson. If the member is still not satisfied, she could appeal the ombudsperson's decision to the whole Council.

Policies also provide specific guidelines against which to evaluate the work of the Director of Operations. Equally important, policies set standards for Chief and Council to follow, and show First Nation members that Council is serious about its trustee role. Also, the Director of Operations is responsible for developing staff policies and procedures that parallel the spirit and intent of Council policies. A framework, with examples of leaders' governance policies, appears in Appendix A.

Effective Use of Staff, Committees and Advisors

Council has the final responsibility for ensuring the effective use of staff, committees and advisors, and in a way that is consistent with Council's objectives. Council must ensure that:

- Council policies are implemented
- Staff administer programs and services as intended
- Rules and regulations are applied correctly and consistently

Council walks a fine line in its monitoring role. Council's job is to monitor the work of the Director of Operations, not to do it. Perhaps not realizing they are doing it, some councillors micro-manage. Before they can monitor and measure the effectiveness of the Director of Operations, councillors must:

- Define Council goals and priorities
- Develop Council policies that define the Director of Operation's authority and responsibility
- Ensure that the Director of Operations has clear staff policies and procedures
- Develop standards and reporting procedures to measure staff achievement of Council's goals

By so doing, Council is free to deal with broader issues of interest and concern to First Nation Members.

In addition to monitoring the Director of Operations, Council oversees the work of Council committees and advisors, and establishes Council values. These are dealt with below.

Establishing Council Committees¹²

Councils often create committees to help meet their responsibilities. Successful committees can help with Council's credibility by involving the community and providing new ideas about how to deal with various issues.

Councils may establish finance, personnel, housing, education or recreation committees. Other levels of government use committees for similar reasons. For example, all levels of Canadian government have advisory or administrative bodies that engage members of the public in government decision-making. These bodies decide matters ranging from the distribution of funding (to the arts, for example), to recommending individuals for various government appointments (e.g. commissioners or judges).

Council must be careful to establish clear terms of reference for its committees. Council organizes committees to carry out, not take over, its responsibilities. Excluding specific, carefully stated purposes, Council committees are advisory in nature. No individual or committee can take over the trustee's role of Council. This is because Council is ultimately responsible, and potentially liable, for all its decisions, including decisions made by committees it creates.

Also, the Director of Operations is accountable only to Council. Therefore, Council should not create a committee that interferes with its delegation of authority to the Director of Operations. Similarly, Council committees should not interfere with or intervene in the business of managers and staff who work for, and are accountable to, the Director of Operations.

Many Councils distribute their workload by assigning "portfolios" to Council members. Some Council members are unclear about the responsibility they have assumed as a portfolio holder. A portfolio holder is a one-person committee. Portfolio holders therefore observe the rules for Council committees – they cannot make decisions that bind Council, except in rare, clearly defined circumstances. Otherwise, Council, not the portfolio holder, will be liable for improper actions by the councillor.

A councillor is usually selected to chair Council committees. Occasionally a person with special, relevant experience (other than a councillor) will chair a Council committee. In each case, the committee chair is the link between Council and the committee. The chairperson reports activities and progress by providing minutes of committee meetings. This allows Council to consider and ratify committee findings or recommendations. Some general principles to consider when creating committees are discussed in Appendix B, and sample terms of reference for establishing a committee are discussed in Appendix C.

¹² These comments apply only to committees established by Council. They do not apply to committees or task groups established by the Director of Operations, or by other groups in the community.

A committee is a body of one or more persons elected or appointed to consider, investigate or take action on certain matters too complex for a larger group.

Council cannot delegate away its trustees' role, or allow an individual or committee to take it over.

A Council portfolio holder is a committee of one, whose purpose is to advise and assist Council, not take over its trustee role.

Relying on Advisors

First Nation business is becoming increasingly technical. This requires Council to rely on a range of specialists managing its programs, services or projects. Council's advisors include internal and external managers, professionals and experts.

The Courts have not required Council members to be experts, nor are they expected to have first-hand knowledge of all aspects of First Nation administration. They are entitled to rely on information prepared by management, and the reports of internal or external experts. However, Council must not rely unquestioningly on its managers or experts if there is any reason to doubt:

- Their integrity or ability
- Their ability to make objective recommendations on a particular issue
- Their demonstration of due diligence in all of their actions or decisions

A professional is a person “whose profession lends credibility” to the statements or reports of that person (e.g. lawyers, accountants and engineers). Still, Council's responsibility is to confirm that the expert or advisor:

- Is qualified to give the advice sought
- Had access to, and considered, information about the advice sought

Questioning prospective advisors closely before contracting them is part of Council's responsibility.

Many decisions rely on Council's understanding of the First Nation's financial condition. When assessing financial condition, Council depends on:

- The integrity of its internal financial systems
- Managers who prepare financial statements or reports
- Auditors who review the First Nation's bookkeeping process and statements

Council often relies on the Director of Operations, or perhaps a councillor or committee, to convey the advice of an expert to them. If in doubt about advice conveyed by an individual or group, Council is obliged to:

- Hear directly from outside advisors
- Not delegate the responsibility to management or an individual
- Hear from and question the advisor without management present

When in doubt about the opinion of an advisor, following these criteria ensures that councillors have met their due diligence obligations, and acted properly as trustees looking after First Nation business.

Overseeing Financial Matters

The sections below deal with Council's financial responsibilities, such as:

- Identifying revenue sources
- Annual financial planning
- Borrowing money

The use of outside advisors should be to help councillors oversee management of Council business, not to help Council participate in the day-to-day management of First Nation business.

Types and Sources of Revenue

Council accesses funds from a variety of sources: federal and provincial governments, and privately. Each source has its own specific conditions, time line and accountability requirements. As part of their due diligence, councillors need to know their obligations under different funding agreements. The Director of Operations can help Council by setting up an annual agenda that lists all agreements, funding amounts, cash flow schedules, and contract dates.

Council, in turn, should inform community members in various ways about its planned expenditures and anticipated sources of revenue. Members are interested in the financial health of their community. Knowing its financial situation helps members participate in important decisions when called upon to do so at community meetings.

Third parties, such as banks, other levels of government and contractors, should also be aware of the First Nation's financial situation when appropriate.

Annual Financial Planning and Budgeting

Budgeting and expenditure planning is an important function of all governments. It is the primary means by which federal and provincial governments inform constituents of the government's agenda and priorities. This is part of the process by which First Nation governments can tell community members about new programs and policies and long-term objectives. Budgets presented at community meetings provide an opportunity for community members to receive information and provide input.

For all organizations, the preparation and monitoring of budgets are important functions. Because proposed expenditures can be adjusted to match actual revenues, accurate cost estimates help identify potential deficits before they occur.

Cash flow statements are also an important Council budgeting tool. Although Council's total annual budget may balance, monthly cash surpluses and deficits often occur during the fiscal year. This is because cash expenditures may not always match exactly with cash inflows. By showing that temporary cash surpluses or shortfalls will occur, bankers often allow Councils to invest, or borrow, funds.

Council relies on the Director of Operations and her staff to prepare a detailed annual budget. Council approves the budget by a motion or resolution, properly recorded in the minutes of a Council meeting.

The budget should be monitored closely and continuously by comparing actual revenues and expenditures with annual budget projections. The Director of Operations is responsible for providing regular monthly financial reports to Council.

Borrowing of Money for Public Purposes

Borrowing money for public purposes is accepted government practice. It is generally considered essential to achieve community and political objectives. Borrowing is a much disputed issue, and has directly led to the end of more than one government – including some First Nation governments. Managing debt and having the ability to regain solvency when finances get out of hand is a challenge for any government.

Thus, Council needs clearly defined policies for the borrowing of money. Council rules should include:

- How much money can be borrowed
- By whom
- When
- Under what circumstances
- Processes that involve community members if borrowing outside Council policy
- Advice of financial experts (auditor, internal/external financial advisors, banker)

Most First Nation Councils are able to meet their financial obligations. However, First Nations sometimes find they need to borrow money for various reasons, and some have experienced significant problems as a result. Canada is not responsible for First Nation debt incurred by borrowing. However, if Council's actions put Canada's legal and fiduciary obligations at risk, INAC may be forced to take some form of remedial action if the situation deteriorates.

Generally, debt should not be used to meet short-term operating requirements unless it can be repaid in the immediate future or, at a minimum, before the end of the fiscal year. By contrast, debt may be used to build large capital projects that will provide services over a number of years. The key in this instance is to assure that the First Nation is certain of a long-term flow of revenues that it has reserved for purposes of repaying the debt.

In summary, it is Chief and Council's responsibility, in consultation with its advisors and community members, to:

- Formulate rules for borrowing
- Define the process for making borrowing decisions
- Oversee the development and implementation of operating policy and procedures for monitoring and controlling debt
- Meet the needs of the community and outside interests for information and performance reporting on these matters

Overseeing Service Programs

The discipline applied to financial administration policy and procedure needs to be applied to the delivery of programs and services. Program and service delivery policies need to be clear. They need to be documented and to incorporate fair, consistent rules and procedures. In addition, program and service managers must be objective and professional.

Politically, Chief and Council's responsibility is to establish workplace values and rules. Values and rules influence how managers develop and deliver programs. Staff incorporate Council's values and rules in their policies and procedures. Values and rules might include, for example, the following:

- Fairness and equality
- Eligibility criteria with respect to services and benefits
- The application of "sunset" provisions to a program or service
- Program and service evaluation requirements
- Reporting to the community
- Conflict resolution and redress

Following policies, paying heed to proper procedures, and properly documenting decisions in Council minutes protects Chief and Council in disputes about the approval of financial decisions or about their accomplishment.

Council Meetings, Minutes and Decisions

A meeting where participants exchange relevant information and where good decisions get made can be stimulating. Conversely, it is boring and frustrating to sit through a poorly organized, badly conducted meeting. The enthusiasm of new Council members may quickly wane if meetings run badly. Nearly all Council's time together is in Council meetings. Official business gets done there. Good meetings are important for the morale of Council. Timely decisions are essential to the proper governance of community business.

Meetings

Councillors lacking the skills or experience to run effective meetings should explore ways to overcome the problem. They should seriously consider training. Workshops can give them the skills they need. Alternatively, an experienced community member or the Director of Operations can act as chair, and help less-experienced councillors develop needed skills.

An effective chairperson is essential to a well-run meeting, although all councillors share this responsibility. Councillors should help the chair maintain order, and keep members on the topic. Some Councils conduct meetings by formal rules of order. Most use abbreviated, informal rules for routine business. Either way, having available a person experienced with formal rules is very helpful. Such a person can reduce animosity among councillors, ease the satisfactory conclusion of complex or controversial business, and ensure that Council conducts its official business properly.

Rules of order help Council run more effective daily and annual meetings, consultations, committees and workshops. Properly developed rules of order protect majority, minority and individual rights, and safeguard those absent from the meeting.¹³ Rules of order should facilitate progress and be people-friendly, and "should not have the effect of frustrating, confusing or intimidating people."¹⁴

¹³ Rozakis, Laurie E., and Ellen Lichtenstein, eds. *21st Century Robert's Rules of Order* (Dell Publishing, 1995, p. 6.).

¹⁴ Mina, Eli, M.Sc., P.R.P. *Deliberations* (Vol. 3, I, Fall 2000, p. 3).

Duly convened meeting:

one in which proper notice is given, a quorum is present, there is an agreed process for running the meeting, and the chair calls the meeting to order.

Quorum: the minimum

number of councillors needed to conduct Council business.

For official business, *Indian Act* “Bands” must observe certain procedures when conducting meetings. Failure to follow the *Indian Band Council Procedure Regulations*, which are brief, can invalidate Council decisions. Council may want to adopt their own written procedures as rules of order to guide them in areas the *Regulations* do not presently address.

Custom “Bands” are not subject to the *Procedure Regulations*. Nevertheless, all organizations should have written rules for the conduct of meetings and the discipline of members. Custom “Bands” can use the *Procedure Regulations*, or other sources, to get ideas about issues to include.

The guidelines for the conduct and content of Council meetings, following legal requirements under the *Procedures Regulations* for all except Custom “Bands,” are listed in Appendix D.

Council Minutes

The decisions of a First Nation Council, like those of any other government, must be properly recorded and documented. The minutes of Council meetings are important records of Council discussions and decisions on issues within their jurisdiction. It is particularly important that all Council decisions be accurately recorded in the minutes. Why are minutes of Council meetings so important?

Sometimes a First Nation constitution creates an organization with legal status. If so, constitutional provisions (as statutes or by-laws) take the empty shell created by law and describe the manner in which the organization can take on life. Such provisions belong to the members, not to Council, because councillors are trustees, acting as fiduciaries for community members.

The provisions therefore say under what circumstances the Band members allow Council to speak (i.e. in a duly convened meeting, with a quorum, by majority vote, etc.). In this way Council business moves from a paper entity to one making real-life decisions. Council minutes thus give voice to the constitution. The minutes therefore “exist to be a legal record” of Council’s meetings and actions as required by the First Nation members. The *Indian Act* serves a similar function to that of a constitution, which is why it specifies what a quorum is, and how Councils should conduct meetings and take minutes.

Occasionally, establishing the legality of a decision of Council is necessary. The minutes should show that Council followed proper meeting procedures and that they accurately recorded the discussion and decision.

Because they record Council business, properly prepared minutes help inform others of Council’s actions and decisions (e.g. staff, community members, other governments, members of the public). Good minutes contain:

- Date, time and location of the meeting
- A list of those present and absent

Minutes are a legal record of Council's meetings and actions *as required by the members.*

- Call to order by the Chair
- Adoption of the minutes of the previous meeting
- A brief comment on the discussion preceding a decision
- The motion, including mover and seconder
- The result of voting on the motion (consensus, majority vote, etc.)
- Implementation of motions or recommendations
 - Who is responsible
 - Completion dates
 - Results expected
- Items requiring further action
- Unfinished business
- Business tabled to next meeting
- Date, time and place of the next meeting

Having verbatim minutes is unnecessary, even inefficient. The meeting secretary should learn how to take minutes that contain key decisions, recommendations, information items and discussions. Recording debates between individuals is unnecessary. The result of the debate as a motion is important because it is the collective (not individual) words or actions of Council that matter. If Council wants a detailed record, meetings can be tape- or video-recorded and filed for future reference. Minutes, while brief, must be true to the business done.

Minutes become the official record of business when Council adopts them at a subsequent meeting. The Chief and the Director of Operations should sign them, and the Chief should initial all pages. Council should file original signed copies of all minutes, by-laws, Council resolutions and other important documents in a safe place in the First Nation office. It is also a good idea to post Council minutes in a public place so that community members can read them. In regard to financial matters, items to be approved by Council might include:

- Monthly financial statements signed by the Chief and the Director of Operations
- Interim and annual budgets
- Annual salary schedules
- Annual audited financial statements
- Allowances and travel rates
- Contracts or financial agreements
- Acquisition or sale of First Nation assets, and
- Money by-laws

Council Decisions

Council resolutions, and motions, express Council decisions. Motions are less formal than resolutions. Ordinarily, a mover verbally presents them, as follows: *"I move that we hold our next regular meeting on June 15th, rather than on the 25th."*

When a motion calls for a greater level of formality, or is complex, it is usually prepared beforehand, and presented at the meeting as a written resolution. In the meeting, a councillor says, for example:

A resolution, or motion, is a *proposal* for action by Council, or members in assembly. Not being a command, Council will carry out the motion only if it has the resources to do so.

"I move the adoption of the following resolution: Resolved, that a panel consisting of at least one member of Council approves all new employees."

The procedure for adopting resolutions (or motions) at a duly convened Council meeting is:

- The chair (or councillor) presents a resolution to the members
- Council members move and second the resolution
- The chair allows discussion of the resolution, giving equal time to those for and against it
- Council passes the resolution by consensus, by a majority vote of councillors, or defeats it
- Council may amend or rescind a resolution following the same process as for its adoption

Sometimes INAC requires a more formal method of expressing a Council decision. Putting the information on an INAC form known as a "Band Council Resolution (BCR)" does this.

COUNCIL'S LEGAL ROLES AND RESPONSIBILITIES

Council's Law-Making Role

First Nation Councils are the elected government of a First Nation and have the authority to enact certain by-laws. These are set out in the *Indian Act*. Historically, the law-making powers of Council have not been used to any great extent. Recently, however, some Councils use their powers to regulate community affairs and achieve objectives. Council exercises its powers by enacting by-laws under Sections 81, 83 and 85.

By-law Powers

Section 81 sets out the "general powers" of Council on matters like health, traffic, law and order, etc. Section 83 deals with "money by-laws," and Section 85 deals with "by-laws relating to intoxicants." Some of these sections are elaborated in Part Seven, below.

A by-law becomes law when it has been legally enacted. For Sections 81 and 83, the *Indian Act* requires "*the consent of a majority of the councillors... present*" at a duly convened Council meeting. Section 85 by-laws require the consent of a majority of the electors at a special "Band" meeting called to consider the by-law (emphasis added). Also, Councils may be required to prove they have complied with other steps in the legal enactment process, namely:

- Proof of proper procedures
- Voting on the by-law
- Recording the result of the vote in the minutes of the meeting
- Signing the by-law
- Forwarding the by-law to INAC
- Storage and distribution of the by-law
- Providing proper public notice of the by-law

Once enacted, laws result in the need for enforcement, an appeal process and penalties. All citizens have the right of appeal under the laws of Canada. This also applies to “Band by-laws,” which the Federal Court may enforce.

Enacting By-laws

As an elected government, Council’s role is to govern. This important role includes enacting laws, developing governance and public administration policies, hiring and supervising the Director of Operations, overseeing program and service delivery to the community, creating special entities such as committees and First Nation enterprises to serve community goals, and ensuring that effective law enforcement exists for the benefit of the community.

In its law-making role, Council may want to develop legislation for a variety of reasons, including:

- Public safety (e.g. traffic and animal control)
- Rules for the use and protection of First Nation assets (e.g. housing, land use, fencing, collection and disposal of garbage)
- Raising revenue (e.g. use and access to a developed campsite area)
- Formalizing First Nation business (e.g. financial administration, conduct of Council meetings)

Although all First Nations can make procedural rules (e.g. conduct of Council meetings), some limitations exist: they have to be consistent with the *Indian Act* (which includes the regulations); and they must be for “matters not specifically provided for” in the regulations, as for example, administrative matters, enforcement issues, and consequences (as penalties).

While the cost of developing laws may seem high, the economic and social benefits to the community can be significant. For example, an improvement in the general health of residents may offset the cost of developing a garbage by-law. Also, a garbage by-law may reduce the expense of periodic cleanups, enhance safety, and make the community more attractive. Moreover, an organized, pleasant community builds credibility for Council, staff, and First Nation members, and can create important opportunities, including economic development.

This is especially important for First Nations that elect their Council “by custom” because the procedural rules regarding Council meetings in the *Indian Act* do not apply to them. The absence of such rules has caused problems in some communities, including a complete collapse in Council’s ability to manage community affairs.

Administrative Appeal

First Nation Councils do not have judicial authority. However, conflicts occur in First Nations communities and among First Nation staff. Accordingly, Council may have a quasi-judicial role in “administrative appeal.” Administrative appeal deals with staff grievances in the workplace, or with community members’ complaints regarding the delivery of programs and services.

For example, a community member may feel the Council's housing policy discriminates against her and her family. An administrative appeal process would allow her to seek relief at progressively higher levels as follows: Housing Director; Director of Operations; Housing Committee; Chief and Council; third party mediation; the courts.

Fulfilling Fiduciary and Legal Responsibilities

First Nation assets are held in trust for the benefit of community members as a whole. This gives rise to Council members having "fiduciary" responsibilities.

Council business is becoming large and complex; larger and more complex even than many Canadian corporations. Because Council business is demanding more time of Chief and Council, many councillors are now paid, as trustees in fact, to make the right decisions. This means court judges would probably assess the legal responsibility of a paid councillor more seriously than that of a volunteer. Councillors, and the Chief, therefore, are accountable and liable when they do not meet certain standards of performance.

The courts have established performance standards for all boards, including Chief and Council, as below:

There can be no question that a duly elected Chief as well as the members of a Band Council are fiduciaries as far as other members of the Band are concerned. The Chief upon being elected, undertakes to act in the interests of the members of the Band. The members of the Band are vulnerable to abuse by the fiduciary of his or her position, and a fiduciary undertakes not to allow his or her interest to conflict with the duty that he or she has undertaken.¹⁵

Fiduciary Duty

Requires that councillors act "honestly and in good faith with a view to the best interests of the membership in exercising their powers and discharging their duties." It also requires that councillors avoid putting themselves in a position where their duty to act in the best interests of the organization conflicts with their self-interest.

Duties of Care, Diligence and Skill

Councillors must exercise the care, diligence and skill that a reasonably prudent person would exercise in similar circumstances. Councillors cannot contract out, or delegate away, their responsibilities.

In the *Gottfriedson* decision, the court stated that the position of the Band council under the *Indian Act* is analogous to the exercise of powers of a municipal corporation.

Such powers must be exercised in strict accord with the statute to protect the interests of inhabitants. In this case that meant that the council's powers to allot (reserve) land could only be exercised by majority vote of the council at a duly convened meeting and not simply by signing a Band council resolution.

(Munro, p. 10)

¹⁵ *Williams Lake Indian Band v. Abbey* (1992), (sub nom. *Gilbert v. Abbey*) [1992] 4 CNLR 21 (B.C. S.C.).

Business Judgement

Councillors are presumed to have acted properly in making a business decision if they acted on an informed basis, in good faith, in the honest belief that the action taken was in the best interests of the First Nation, and was without fraud or self-dealing.

There are many examples of Councils that have found ways to fulfill their political, functional and legal duties. Such Councils build credibility in the eyes of their members and stakeholders. Because they manage their resources well, funding agencies are able to provide them with broader authorities and involve them in a wider range of projects, such as economic development ventures.

Establishing Council Values

The purpose of establishing and honoring values is to guide Chief and Council on high standards of personal conduct while in office. The trust of community members is fundamental to the continuing existence of their government. To be successful, members must honor and respect Council decisions.

Chief and Council are the members' trustees. As trustees, Council must be credible. A credible Council helps build a respected community. Such a community gets financial and other opportunities for members that a less credible community will not get. For example, banks and other funding sources will favor project proposals by a well-managed community. Councillors, therefore, should have high standards of public and private conduct. They should avoid actions that:

- Reflect badly on the First Nation
- Jeopardize their fitness for duty
- Impair their effectiveness in dealing with other First Nation officials, employees, the public, or officials of other governments

Many Councils enshrine First Nation values and principles in a code of ethics and in conflict of interest guidelines.

Code of Conduct

Even if Council has not adopted a formal ethics code, an ethics violation could damage the First Nation's reputation for honesty and integrity. A bad reputation affects the First Nation's relationship with its stakeholders. By adopting and following a formal code of conduct (or ethics), Council helps ensure that the First Nation maintains a good reputation. A well-written conduct code helps detect and prevent wrongdoing by Council members. The code will also have corrective action procedures to follow if misconduct occurs.

A code of conduct code should reflect the culture and history of the First Nation. This gives continuity to values and principles of governance the community has found beneficial in the past. Appendix A includes an example of a Council Code of Conduct.

Conflict of Interest

Conflicts of interest pose special challenges for First Nations leaders. Many First Nation communities are small. Often, a councillor's decision will potentially

To be effective – to make things happen – any government must have three basic attributes: legitimacy, power and resources. (RCAP, 1996, vol. 2, pp. 163-5)

affect a family member or friend. However, councillors have a fiduciary obligation to all First Nation members. Members have a right, therefore, to expect councillors to behave properly when a conflict of interest occurs.

Council, and Council members, have a legal obligation to avoid conflicts of interest. Ignoring this obligation puts them at risk. Since Council's work is that of a trustee, it is subject to a trustee's legal obligations. This obligation is described as follows:

*All trustees have the **duty of care** – to attend (meetings), participate in decisions, and be reasonably informed on matters that relate to the decision; and the **duty of loyalty** – to exercise their powers in the interest of the organization, rather than in their own or anyone else's interest [emphasis added].¹⁶*

Behaving properly therefore means that a councillor who finds himself in a real or perceived conflict must declare it, and must remove himself from the room and the discussion. Additionally, should the councillor not declare, others recognizing the conflict must bring it to Council's attention. If in doubt, Council or the individual should get legal advice.

The usual standard for handling conflicts of interest are met by a councillor who:

- Makes full disclosure of personal interest in the matter to be considered
- Does not participate in the discussion
- Does not participate in or influence the decision

Council may establish a different standard, for example, by permitting the councillor to participate in the discussion and decision following full disclosure of her personal interest. However, if the councillor, a relative or associate benefits, she remains in conflict. The councillor's actions could invalidate Council's decision, and result in personal liability.

The *Indian Act* is not specific about conflicts of interest. It refers instead to a councillor's "personal interest:"

Every member present when a question is put shall vote thereon unless the council excuses him or unless he is personally interested in the question, in which case he shall not be obliged to vote.¹⁷

Here, one can assume that "personal interest" has the same meaning as "conflict of interest."

Having policies to govern conflicts of interest is wise, not only for Council's benefit, but also for First Nation employees. The advantage of written policies is that they are available to everyone; violations are apparent and better resolved.

¹⁶ Howe, Fisher. *Welcome to the Board: Your Guide to Effective Participation*. Jossey-Bass (1995), p. 78.

¹⁷ Imai, Shin. *2000 Indian Act and Aboriginal Constitutional Provisions*. Carswell (1999) p. 192. Section 19, Indian Band Council Procedure Regulations.

Council Leadership: The Job of the Chief

INTRODUCTION

The Chief is the elected head of the First Nation government and the primary officer responsible for governing the community. Although the way Chiefs are selected may vary, their roles and responsibilities do not. Whether selected by custom or by election under the *Indian Act*, the roles and responsibilities of the Chief should be clearly defined to avoid conflicts within Council.

Authority comes from the moral, political and legal right to command. (Leighton and Thain, p. 2)

ROLES AND RESPONSIBILITIES OF THE CHIEF

Besides his or her role as a member of Council, the Chief's responsibilities, and accountability, include the following:

- Acting as the First Nation's official spokesperson or representative at ceremonial or other special functions and delegating this responsibility when required
- Being called upon to speak for and express the opinions of the First Nation when dealing with general matters of concern to the First Nation
- Ensuring that the Council conducts itself in a manner consistent with its own rules, applicable First Nation by-laws and any other applicable laws
- Calling emergency meetings of the Council to discuss important business that cannot wait until their next regular meeting (the Chief shall summon a special meeting, if requested to do so by a majority of the Council)
- Making decisions in accordance with Council policies on the governance process and on the Council - Director of Operations relationship, subject to approval by Council on a timely basis. Approval should ordinarily take place at the next regularly scheduled Council meeting
- Ensuring that a mechanism is in place to determine Council's formal position on significant matters and the means of communicating this position externally (media, public) recognizing relevant legal limitations
- Acting as chairperson at Council meetings. An approach found effective by some First Nations is to allocate the duty of chairperson to another councillor, or to rotate the duty among the members of the Council. This allows the Chief to participate in the discussion and to vote. It also gives other councillors experience in conducting council meetings. The chairperson must be neutral when conducting meetings and only votes to break a tie

The Chief's responsibilities (as above) deal mainly with the relationships Council has with other parties. Council also needs to be concerned about its own internal working relationship. While the Chief is a member of Council, he is also Council's leader. Therefore, another important part of the Chief's job is to:

- Help Council be an effective team
- Make sure Council does the work of Council
- Make sure Council focuses on the long-term needs of community members

The Chief manages Council by setting its annual meeting schedule and agenda, controlling attendance, determining Councillor information packages, helping appoint committees, and attending committee meetings when appropriate. She helps develop a more effective Council by monitoring each Councillor's performance, determining Council's work, planning Council succession, providing Councillors with opportunities for self-development, and working with those Councillors who may be experiencing difficulties in their Council duties.

The Chief, with the assistance of the Director of Operations, should ensure that Council has a leaders' policy manual, and an orientation process for new Councillors. A properly developed leaders' policy manual contains all policies that guide Council's working relationship with each other, with their members and with their staff. The manual would also set out the orientation process for new Councillors. The Chief who masters the range of responsibilities listed above will be effective, and accountable (see Appendix A).

THE TOOLS OF THE CHIEF

Besides the governance tools identified in Part One, the Chief, as Council's chairperson, is responsible for ensuring the development of at least two other tools: Council's Annual Agenda, and meeting rules of order.

Council's Annual Agenda

An Annual Agenda is important because it establishes a schedule for Council meetings (monthly or as agreed), and incorporates key decisions and reviews that Chief and Council must make during their business year. For example, the Annual Agenda would list all contractual obligations and deadlines. Similarly, it includes the Director of Operation's probation period (if new), and his performance and salary review. The agenda should also identify when Council will conduct or review its own performance, that of individual councillors, and its strategic plan.

Meeting Rules

Because the Chief usually chairs Council and other meetings, he is responsible for getting business done in a productive way. Having strict rules of order is not essential. In fact, a good chair runs meetings in what may be an informal way, but has the knowledge and skills to resort to more formal rules when necessary.

Some Chiefs are uncomfortable chairing meetings. This is not a problem if the Chief ensures a suitable person is available to chair Council and community meetings. The key, however, is for the Chief to recognize, first, the need for adopting an agreed set of meeting rules with Council and the community soon after being elected. Secondly, when not chairing, the Chief should observe the protocols he would expect if he were chairing the meeting.

EXERCISING THE CHIEF'S ROLES AND RESPONSIBILITIES

In many ways, the Chief's role is more complex and demanding than that of individual councillors. As Council's leader, the Chief is expected not only to manage his own work well, but to manage that of Council and of individual councillors. The Chief needs to understand his job by sizing up the roles he has to play. In the course of his duties, the Chief will be called upon to:

act convincingly in the roles of discussion leader, spokesman, referee, strategist, politician, decision maker, leader, follower, motivator, teacher, cheerleader, disciplinarian, moralist, confidant, father confessor, personal counselor, coach, friend/enemy, and more.¹⁸

An important, perhaps critical, role of Chief is to foster a mutually respectful working relationship with the Director of Operations. The Director needs a mentor – someone who can provide him with guidance when it is needed. Conversely, an experienced Director can help the Chief do her job by advising her on matters with which she may not be familiar.

While Chiefs play many roles, some they should avoid, especially “end runs.” An end run occurs, for example, when community members, or staff, ignore staff hierarchy by going directly to the Chief to meet their problem or need. Alternatively, the Chief may favor a staff member, asking him to perform tasks without talking to his supervisor. The problem arises when the Chief creates an expectation that the individual will get a result not otherwise available through ordinary channels.

Except in special situations, end runs are wrong. Such actions intimidate other workers and may poison workplace morale. The Chief should not avoid members or staff. He should listen to their concerns and direct them to the proper person or department. If warranted, he should bring the matter to the Director of Operations or to a Council meeting. By doing so, the Chief sets an example by hearing and appropriately dealing with the individual's concerns.

Some communities lack the resources to staff their administration office properly. When this occurs, Council may ask the Chief (or a Council member) to do the Director of Operation's job. Unless Council, and the Chief, take the time to define their expectations and working relationship clearly, problems often arise. Reducing problems requires separate job descriptions for the Chief and for the Director.

When acting as the Director of Operations, the Chief is not a member of Council – she is as accountable to Council as if she had been independently hired by Council to do the Director's job. A Chief who respects this distinction may be

¹⁸ Leighton and Thain, pp. 150-1.

effective for a time, but is walking a tightrope. Devoting Council energy toward obtaining the resources to hire the best possible Director is far better.

Another problem (but perhaps more extreme) arises when a program director gets elected to the position of Chief and keeps his or her director's job. Leaders must avoid this dual role. Right or wrong, the Chief may be viewed as having a conflict of interest, which threatens and demoralizes staff and some community members. Developing suitable policies for leaders and staff, and making them known, may prevent this problem.

Council's Relationship with Community Members

It is in the interests of a strong Council to have knowledgeable, informed community members. Unfortunately, because Aboriginal people have only recently become less influenced by the *Indian Act*, community members may not know their rights and responsibilities. Members can have a major impact if Chief and Council inform them about Council activities, and provide them with education about their legitimate role (through workshops, etc.).

MEMBERS' ROLES AND RESPONSIBILITIES

Knowledgeable First Nation members are the foundation of good First Nation government. Members who know their rights and responsibilities can positively influence their leader's actions. Since members, collectively, are the owners of First Nation assets, they need to monitor Council activities. Generally, community members have the authority to conduct business in community assemblies, to elect their leaders, and to offer them advice. They should expect Chief and Council to keep them informed about First Nation business between assemblies.

Community members delegate power and authority to Chief and Council by electing them. Understandably, if what they delegate is unclear or undefined, members and Council may soon be at odds with each other. The *Indian Act*, being silent on the role of community members, is of no help. The question is, "Having elected Chief and Council, what authority do community members retain?" Ordinarily, the answer to the question is found in the by-laws or constitution of an organization.

For example, the powers and duties of municipal councils in British Columbia are those of an agent exercising provincial authority under the Municipal Act. Municipal electors select their council, but government provisions regulate what the municipal council may do (powers), must do (duties), and may not do (prohibitions). The powers, duties and prohibitions of a First Nation Council could be regulated in the same way.

Some First Nations have by-laws that regulate the authority of Chief and Council. Others, especially those with modern treaties, or self-government constitutions, specifically regulate not only the powers and duties of Council, but of First Nation members too. Some Yukon First Nations constitutions, for example, have a clause requiring that the members in assembly authorize Council's annual budget. Such by-laws are not made under the *Indian Act*.

With or without a constitution or by-laws, community members can expect Council to:

- Act in the best interest of all members
- Be diligent
- Report regularly and fully First Nation finances, projects, programs and services

Delegating the responsibility for directing and controlling First Nation business to Chief and Council means members have the right to ask questions in meetings. Further, members should expect Council to establish grievance and conflict resolution processes. If members or individuals have exhausted grievance procedures, or if there are none:

- An aggrieved member can commence an action against Council for a specific grievance against him personally
- An individual may commence an action against Council on behalf of the First Nation
- Community members may take a collective action against Council
- Actions may be taken against individual councillors for breach of duty

Members have the authority, in assembly, to establish committees for resolving issues too technical or complex for a larger group. Such committees are ordinarily advisory in nature, and report their findings or recommendations to the members in a subsequent assembly. Establishing a committee with more authority than Council, or to do the work of a Council or Staff committee, is improper. Members can take steps to limit the power of Chief and Council when their actions require it.

Members exercise their right of ownership by holding accountable those to whom they have delegated authority. Members are also accountable. Their responsibilities include attending meetings, informing themselves of First Nation business, treating with dignity and respect Chief and Council, staff members, advisors and each other. Most important, community members have the final responsibility to select or elect a Chief and Council members who possess the necessary skills, experience and values to lead the community properly.

GOVERNANCE TOOLS AVAILABLE TO COMMUNITY MEMBERS

As described in Part One, councillors have certain governance tools that they rely on to help them do their job. Community members also have access to these tools; when things go wrong, they can use the tools of governance to help bring their leaders or individual community members back on track.

A First Nation constitution, for example, sets out the expectations community members have of Chief and Council. The articles in the constitution define how much authority Council has, and includes clearly written checks and balances on Council power.

Similarly, community members or staff can rely on the Common Law, Canadian Human Rights Act, or the Canada Labour Code, when their rights are violated by Council (see Part Seven).

INVOLVING MEMBERS IN FIRST NATION BUSINESS

Some Councils encourage their members' participation by opening their meetings to community members. Council only excludes community members for improper conduct. Council may allow time during their meeting to address public concerns. If so, it is appropriate that community members contact Council beforehand to be placed on the agenda.

During normal office hours, community members should have reasonable access to the minutes of Council meetings, First Nation by-laws (or constitution if one exists), policy manuals, grievance or conflict resolution procedures, and financial statements. Also, Council should give community members an opportunity to present their views on important issues, such as a new by-law or a major policy.

Council should hold annual meetings with members to report on or discuss First Nation policies and programs, drafts of proposed by-laws, changes to existing policy or law, and to disclose financial matters. Council may also wish to establish committees to obtain the advice of members formally. Some Councils formalize the creation of certain committees in the First Nation constitution. Finally, Councils occasionally organize workshops for community members on various topics, including governance and community members' rights and responsibilities.

Council's Relationship with the Director of Operations

Depending upon the First Nation's size and resources, keeping the governance work of Council independent from the daily work of management and staff is preferable. By doing so, Council can concentrate on the long-term interests and needs of the community. This arrangement works best when Council has hired an honest, ethical Director of Operations with at least the minimum skills and experience to do the job.

DIRECTOR'S ROLES AND RESPONSIBILITIES

The Director of Operations (Director) is accountable only to Council, and should have full authority and accountability for all staff operations. This relationship reduces the already substantial workload of Council. It allows the Director, managers and staff to work according to established rules and procedures that Council has approved. For example, while Council should avoid being involved in the actual hiring process, approving the number, duties and qualifications of staff is appropriate. The key management functions of the Director include:

- Supporting Council
- Recommending policies and standards to Council
- Building and maintaining the First Nation council office
- Public relations
- Providing an "emergency backup" system

A suitable Director of Operations can help Council define its purpose, develop goals, strategies and action plans, and implement Council and staff decision-making processes. In Council's absence, she will set office standards by being the day-to-day conscience of the organization, and by providing Council's vision and helping to set values.

Being familiar with all managers and staff, the Director sets an example for the entire organization, sets standards of conduct, and watches for potential managers and leaders. As Council's contact with community members, government and suppliers, the Director practices good public relations always. Finally, not only does the Director back up Chief and Council in emergencies, she has a suitable backup person for herself.

TOOLS OF THE DIRECTOR OF OPERATIONS

The Director needs certain tools to do her job. The tools of governance discussed in Part One are not only for Council, but for the Director of Operations as well. The governance tools of special significance to the Director are Council's leadership policies, annual agenda, and meeting minutes. The Director relies on Council's governance tools when building the tools she needs for her managers and staff.

Assuming that the Director of Operations has the skills and experience to do the job, and a positive attitude about on-job development where skills may be lacking, it is an essential Council responsibility to support the Director, as he/she manages the daily operation, by:

- Providing the direction Council wants the Director of Operations to take
- Providing the resources needed by the Director of Operations
- Letting the Director of Operations do the job
- Expecting feedback from the Director of Operations
- Evaluating how well she leads the organization

More specifically, the Director has responsibility for:

- Benefits, services and program delivery
- Business development
- Human resources management
- Financial management
- Physical plant management
- Community relations
- Planning
- Council and government liaison

These activities require the Director of Operations to ensure that the First Nation's administrative standard of services is consistent with First Nation by-laws, legislative and regulatory requirements, and other contract conditions. He must ensure the consistent implementation of Council-approved policies and procedures. Finally, the Director is Council's sole link to the operation of the First Nation. He is therefore accountable for all organizational performance, and exercises all authority delegated to him in his job description.

DIRECTOR'S QUALIFICATIONS

The six qualifications, or requirements, of a Director include the knowledge and experience to plan, organize, control, communicate, delegate, staff and accept responsibility.

Planning & Organizing

The Director of Operations must be able to plan for himself, for staff and for staff development. He must also have the skills to plan current year objectives, budgets and expenditures. His organizing skills must include the ability to use his own time and staff time, and he must ensure that staff understand their responsibilities. He must have the ability to develop the internal organizational structures necessary to deliver programs and services.

Controlling

The Director's controlling function requires her to ensure that others do their job as planned and organized. She must establish monitoring processes to control the First Nation's internal operation. For example, while Council sets and approves the budget, the Director of Operations makes daily decisions about how the budget is spent. It is important that Council stand back and let the Director and her managers manage.

Communicating

The Director must have clear oral and written communications skills. Reporting by the Director in Council meetings, and to the community, should be brief and to the point. The Director should always keep lines of communication open with Council, the staff and community members.

Delegating

Not only is a competent Director receptive to duties delegated by Council, he properly delegates and monitors staff duties. The Director of Operations should always use good judgement when delegating work to staff. However, the Director cannot completely delegate to staff, or to a committee, responsibility for his job.

Staffing and Acceptance of Responsibility

Recognizing that he can hire, fire, evaluate and discipline all staff, Council leaves this work to the Director of Operations. He accepts responsibility for staff performance, uses good judgement in undefined areas of his job, and takes responsibility for decisions in those areas.

SELECTING AND SUPPORTING THE DIRECTOR OF OPERATIONS

Selecting the right Director of Operations is a crucial task of Council. In doing so, Council must ensure that the individual has a concern for the future, and can:

- See the whole business of Council
- Make decisions for the whole business
- Work in a team environment
- Function regardless of personal relationships

Council's Relationship with Indian and Northern Affairs Canada (INAC)

THE CROWN AS A TRUSTEE

Whenever someone is in a position to exercise control over, or make decisions concerning, the property of another person, the law says that a fiduciary relationship exists between them. A fiduciary is therefore like a trustee. The person who owns the property trusts the fiduciary, or trustee, to deal with the property in the best interests of the owner.

The Crown has a special relationship with the Aboriginal people of Canada, which the courts have described in cases like *Guerin* and *Sparrow* as a “fiduciary relationship.” While the nature of this fiduciary or trust-like relationship assumes that the Crown will not act in a way that is contrary to the interests of Aboriginal people, not all aspects of this special relationship give rise to a legally enforceable obligation on the part of the Crown.

In general terms and subject to the findings of a court that the specific legal requirements for a breach of fiduciary duty have been met, there are two situations in which legally enforceable fiduciary duties arise. First, in the case of the Crown's dealings with Indian reserve lands, and second, in the case of an interference by the Crown with any Aboriginal or treaty rights that are protected under the *Constitution Act, 1982*.

Indian and Northern Affairs Canada, as a department of the federal government, has to comply with the Crown's fiduciary duty to Aboriginal people.

FUNDING AGREEMENTS

As a matter of policy, INAC provides funding to First Nations to deliver certain programs and services to their communities (see INAC Organization, Appendix E). The terms and conditions under which INAC funding is provided are set out in a funding agreement between the Department and the First Nation. The most common types of funding agreements include: comprehensive funding agreements, financial transfer agreements and the Canada / First Nations funding agreement.

INAC Funding Agreements are contracts. As with any contract, should a First Nation fail to carry out its obligations under a Funding Agreement, INAC can take any of several steps to remedy the situation depending on the seriousness of the situation. For example, INAC can:

- Require the First Nation Council to
 - Develop a remedial management plan
 - Enter into a co-management agreement
- Appoint a third party manager
- Withhold funding
- Terminate the agreement

However, INAC cannot rely on Funding Agreements as a general authority to intrude in the financial affairs of First Nations randomly.

TRUST MONEYS

Trust Moneys Held in the Consolidated Revenue Fund (CRF)

The *Indian Act* gives the Minister the ability to authorize and direct the expenditure of Indian moneys with the consent of the First Nation council. The *Indian Act* defines Indian moneys as “*all moneys collected, received or held by Her Majesty for the use and benefit of Indians or Bands.*” Indian moneys include moneys from the leasing of reserve land, or the harvesting of reserve resources such as timber, oil or gas. These moneys go into one of two accounts: the Revenue Trust Account, or the Capital Trust Account. Funds transferred to First Nations under funding agreements or from own source revenues are not Indian moneys as defined in the *Indian Act*.

With regard to the expenditure of Indian Band moneys, Sections 64 and 66 of the *Indian Act* set out the specific powers and duties of the Minister, while Section 69 sets out the powers of First Nations. These provisions place significant controls over the expenditure of Indian moneys in the hands of the Minister and his officials. However, the Minister cannot take any action to release Indian moneys from the Consolidated Revenue Fund without the expressed consent of the First Nation Council.

Moneys Held in Private Trusts

First Nations are increasingly receiving significant sums of settlement moneys, especially from the resolution of contemporary treaties, historical treaty land entitlements (TLE) and specific claims. If the members vote, such settlement moneys could be paid directly into trust arrangements outside of the Consolidated Revenue Fund.

The Crown’s position is that funds derived from settlements are deemed not to be Indian moneys, and do not have to be managed under the *Indian Act*.¹⁹ However, it is the Crown’s position that:

- settlement agreements are to be ratified by a Band vote based on the informed consent of the membership;
- the decision to place settlement funds in an external trust, or CRF, must also be based on the informed consent of the Band membership;

¹⁹ The Band membership can decide, at the time of signing the agreement with INAC, to place its settlement funds into the Consolidated Revenue Fund to be managed by the Crown.

- Canada assumes no fiduciary obligations regarding the use of settlement funds placed in an outside trust;
- the Crown will have no further involvement with these funds because when they cease to be “Indian moneys” they become the full responsibility of the First Nation and its trustee.

In other words, the First Nation Council, or a board of directors established with the informed consent of Band members to oversee the trust, would have the responsibility of a trustee over settlement moneys in the outside trust.

OWN SOURCE (OR SELF-GENERATED) REVENUES

The federal Crown does not have any responsibility over the revenues that First Nations independently earn (e.g. revenues earned from golf courses, construction companies, or gambling enterprises owned and operated by a First Nation).

Individual First Nation members can commence representative court actions against the Council or individual councillors who have broken their position of trust regarding First Nations assets under their control. In addition to any private or civil law remedy available against a First Nation Council or councillors, individual councillors can also be subject to criminal proceedings under the Criminal Code.

Civil and criminal remedies could also be available concerning the misuse of Indian moneys or if the terms of federal funding agreements are violated.

Council's Relationship with Other Stakeholders

As defined in Part One, a stakeholder is any group within or outside an organization that has a stake in the organization's performance. Banks, contractors, creditors, suppliers, government and other groups in society are considered to be stakeholders of Council if they influence, or are influenced by, what Council does.

ABORIGINAL ORGANIZATIONS

Most First Nations lack the human and financial resources to cope with every issue that confronts them. A broad issue may only get resolved with the involvement of several First Nations. An economy of scale may make it appropriate to deliver a particular service at a higher political level. For these and other reasons, First Nations have found it useful to organize regionally, provincially and nationally.

First Nations usually organize regionally as tribal councils, which provide advisory services to First Nations and may advocate First Nations interests. They may also deliver some programs and services to community members, including:

- Health
- Education
- Membership
- Economic development
- Technical services
- Policy or legal research

Power lies in numbers. Therefore, provincial and national Aboriginal organizations also provide an important lobby service for individuals, First Nations and tribal councils. These senior organizations are found centrally, in cities, and can help Council delegations arrange meetings with government and industry. They are in a position to provide an important advisory service to First Nations and tribal councils. Also, they frequently intervene in court cases that may advance the legal or political rights of Aboriginal people.

First Nations obviously benefit by their association with other Aboriginal organizations. While a councillor probably represents the First Nation on the tribal council board, it still entails delegating authority to them. One may forget (or be confused about) in whose interest the senior organization acts. Although a councillor's first responsibility is to act in the best interests of her community members, she must also act in the best interests of the members of the entire tribal council. This can create problems or stress between the two organizations.

Leaders can minimize problems first if councilors are clear about the merit of delegating authority to a tribal council, PTO or national organization (see national aboriginal organizations, Internet Support, Appendix F). secondly, if the tribal council has a carefully crafted constitution and by-laws that define its relationship with member First Nations.

The number of external organizations a First Nation works with may at first overwhelm a new Chief or councillor. Also, the need to attend meetings can be daunting, particularly for a small First Nation Council. In these circumstances, Council might consider delegating at least part of their workload to the administrative staff. Members of the community with the necessary skills, interest and experience may also be willing to help.

GOVERNMENTS

First Nation Councils frequently deal with other levels of government to resolve common issues or to enter agreements for the delivery of services. For many reasons, Councils are developing increasingly significant working relationships with provincial, territorial and local (e.g. regional and municipal) governments. These relationships are briefly discussed below.

Federal Government

Not only are First Nations assuming greater control over their own affairs, federal policy requires devolving a wide range of programs and services to them. The government has not restricted devolution to INAC. Other federal programs specifically focused on Aboriginal needs and services are listed alphabetically in Appendix G.

Provincial, Territorial and Municipal Governments

Because provincial and territorial governments deal with Aboriginal people differently, the various programs and services of potential interest to First Nations communities are not discussed here. Instead, it is proposed that regional guides be developed and circulated as a supplement to this handbook in the future.

Overall, however, provincial and territorial governments are becoming important Council stakeholders. A First Nation planning a major economic development proposal may enter into a joint venture with a company registered under the laws of their respective province. Also, Councils can occasionally use provincial programs or services for their proposals. Council sometimes has to observe both federal and provincial environmental laws. On occasion it is to Council's advantage to partner with an adjacent municipality when building a water and sewer system.

On the other hand, the impact of provincial laws, regulations and policies may affect Council or the community.

OTHER STAKEHOLDERS

Chief and Council also deal with individuals and corporations for commercial purposes, including banks, and contractors who supply a wide range of goods and services. These are usually mutually beneficial contractual relationships between Council and the stakeholder. Nevertheless, because they are affected by the performance of Council, they have a direct interest in Council business. A banker, for example, can be very helpful to Council, but only if Council has a good working relationship with her.

Because Council business is becoming “big” business, and involves staff who may ordinarily belong to a professional association or labour union, some employees are seeking union certification. Labour unions, therefore, are a potential stakeholder group of Council.

Council's Legal Environment

INTRODUCTION

Councillors make a difference in their community by establishing good policies, providing relevant programs and services, and developing First Nation laws on important matters. Some councillors run for office because they see the need to zone their community for housing and economic development. Others run for office because they feel the need to do more for First Nation Members on social issues. Whatever their reasons for seeking office, councillors need to be aware not only of their powers, but of the legal limits on how they conduct First Nation business.

The legal limits on Council powers come from the Constitution of Canada, federal law, some provincial laws, the common law, and, in Quebec, French Civil Law (Quebec Civil Code).

CONSTITUTION OF CANADA

Constitution Act, 1867

*The Constitution Act, 1867*²⁰ contains sub-section 91 (24) which gives the federal government the sole authority to pass laws concerning Indians and the lands reserved for the Indians. It is under this power that the federal government passed the *Indian Act*.

A discussion of the *Indian Act* follows in Part Nine.

Constitution Act, 1982: Sections 1 - 34

The Canadian Charter of Rights and Freedoms is contained in sections 1 to 34. It sets limits on governments when they are passing laws that affect the rights and freedoms of the people. The Charter applies to First Nation Councils. Some self-governing First Nations have specifically accepted the application of the Charter.

Constitution Act, 1982: Sections 25 and 35

Section 25 shields Aboriginal and treaty rights from application of the Canadian Charter of Rights and Freedoms. Section 35 contains the constitutional recognition of Aboriginal and treaty rights.

²⁰ Formerly known as the *British North America Act*.

FEDERAL LAW

Many federal laws affecting the Canadian nation as a whole have an important affect on First Nations persons and Councils. These include:

Canadian Human Rights Act

The *Canadian Human Rights Act* prohibits discrimination on a number of grounds. It covers possible discrimination in job postings and appointments, and could therefore affect actions of Council. Persons who feel Council has violated their rights under the *Canadian Human Rights Act* may complain to the Canadian Human Rights Commission.

For example, a woman who had regained status through Bill C-31 complained that she and her husband were discriminated against when denied housing on reserve. The First Nation argued that the Canadian Human Rights Act did not apply because of its section 67, which reads:

Nothing in this Act affects any provision of the Indian Act or any provision made under or pursuant to that Act.

The Federal Court rejected the First Nation's argument. It said that decisions on the allocation of housing did not fall under the *Indian Act*.²¹

Councils should therefore familiarize themselves with the *Canadian Human Rights Act*.²²

Canada Labour Code

As an employer, the First Nation Council is involved in the hiring, disciplining and firing of employees. In doing so, Councils must be aware that these activities are regulated by the Canada Labour Code. For example, proper termination of employment may occur in four ways under the Code:

- By incomplete performance of contract by the employee
- By mutual agreement
- When the employee resigns
- When the employer terminates the employee

Most disputes arise when Council improperly terminates an employee. Council can reduce or eliminate such disputes by developing appropriate policies and following proper procedures. When in doubt, Council should consult the appropriate labour board to ensure that it is observing the proper labour standards.

Again, when an individual is being terminated, federal law requires employers to give two weeks' wages if the employee worked more than three months and less than three years, whereas provincial laws may require only seven days' notice, and two weeks' notice if the employee worked more than three years.

²¹ Imai. 2000 *Indian Act*, p. 14.

²² Councillors should also be aware that the *Canadian Human Rights Act* Review Panel has recommended that section 67 be repealed.

Moreover, employees may be dismissed for “just cause” without any notice. “Just cause” includes:

- Insubordination (refusing to carry out reasonable, lawful orders)
- Dishonesty or fraud
- Serious inability to do the job
- Repeated minor breaches of employment contract or job description

Council, as employer, may be liable for dismissing an employee without “just cause.”

Other Legislation

The law requires that Council ensure that certain employee-related benefits or deductions are properly handled, such as: wages, vacation pay, termination pay, and source deductions such as the Canada Pension Plan and Workers Compensation. Council must also ensure that the rules involving Occupational Health and Safety Legislation and the Goods and Services Tax are observed.

While Council delegates such matters to the Director of Operations, Council may not escape liability if the Director or her staff violate the rights of employees regarding such legislation.

CANADIAN COMMON LAW

Canadian law is largely made up of laws passed by governments and decisions handed down by the courts. Court decisions are based on interpretations of the laws passed by governments or of previous court decisions, which make up what is known as the “common law.”

Law of Contract

The law of contract is based mainly on the common law, although there are statutes passed by governments that deal with this area of law. Contract law deals with such matters as agreements concerning loans, purchases, and other arrangements under which persons make agreements in their business relations.

Council should therefore be aware of the rules of the law of contract since it is continuously engaged in business relations with individuals, corporations and governments.

Law of Tort

Like the law of contract, the law of tort is largely the creation of the common law. A tort is a civil wrong. Whenever someone adversely affects the person, property, reputation or certain other interests of another, then a civil wrong, or tort, may be involved. The victim of the wrong is entitled to sue the alleged wrongdoer in court, and obtain compensation.

Therefore, in its normal day-to-day dealings with others, whether individuals or corporations, Council may run the risk of committing a tort. Consequently, the Council should have some understanding of what is involved in the law of tort.

Criminal Law

In the same way, Council should be aware of the basic elements of the criminal law in its day-to-day conduct of business so as not to expose itself to the risk of committing a crime. This could include matters such as misappropriation of funds, fraud, and conspiracy to commit crimes.

Supreme Court of Canada Decisions

Every province has a Court of Appeal. Decisions handed down by this Court bind all the courts below it in the particular province. The Supreme Court of Canada is the final court of appeal for the whole country, and the decisions of this Court bind all other courts throughout the nation. That is why the Supreme Court, located in Ottawa, is a very important court for everyone, including Aboriginal persons.

Recently, the Supreme Court handed down decisions in a number of cases dealing with Aboriginal and treaty rights and title. These cases have far-reaching effects on the rights of the Aboriginal peoples and the relationship between Aboriginal peoples and the rest of Canada. It is foreseeable that in the next few years more and more cases will reach the level of the Supreme Court. These cases are publicized in the newspapers and Council should maintain an interest in matters going before this Court that concern Aboriginal and treaty rights and Aboriginal title.

QUEBEC CIVIL LAW

Unlike the common law that the rest of Canada shares with many countries of the world, the legal system in Quebec is unique.

The court structures and those areas of law in which the public interest is mainly involved – such as constitutional law, administrative law, criminal law and tax law – are based on the English common law. However, the private law, which primarily involves private interests, is based on what is called “Civil Law,” that is, what Quebec historically inherited from the French.

The major difference between the English common law system in the nine provinces and three territories and the French Civil Law system in Quebec is one of approach in deciding cases: the common law system examines previous decisions by courts and tries to extract general principles from them to apply to the particular case to be decided; whereas, in the Civil Law system, cases are decided by interpreting principles which are codified in the Quebec Civil Code.

PROVINCIAL LEGISLATION

Councils should be aware that laws passed by provinces, which apply to all persons in the provinces, may apply also to Indians. These are known as provincial laws of general application. However, only the federal government may pass laws for Indians only and lands reserved for the Indians only under the exclusive authority set out in section 91 (24) of the *Constitution Act*, 1867.

Also, the employees of some organizations or businesses created by Council may be subject to provincial labour standards. To avoid liability, Council should seek legal advice when creating organizations which are subject to provincial statute, rather than the Canada Labour Code.

The *Indian Act*

INTRODUCTION

Because the *Indian Act* provides the legal authority for some Council functions, councillors should know what the provisions say. This section will introduce Council to some provisions. Councillors wishing detailed information about all provisions should obtain a copy of the *Indian Act*, or contact the Lands and Trust Services Directorate, and INAC headquarters.

While the Act, given its origin and history, defines a “Band’s” relationship with the federal government, it neither precludes, nor mentions, Council’s relationship with “Band” members. Moreover, Aboriginal initiatives and federal devolution policies have recently led to a less prominent role in First Nation communities for INAC officials. Also, with respect to Council’s relationship with the federal government, one court decided that:

No express provision of the Indian Act, and no implied policy of that Act make the members of an elected council agents of the Crown (Isaac v. Davey, 51 D.L.R. p. 183).

Be that as it may, while *Indian Act* provisions may guide what Council does, councillors, by virtue of their position, are agents, or trustees, of their community members. However, another case said that the Council is a “federal board, commission or... tribunal within the meaning of the *Federal Court Act*.”²³

Because a “Band council” is a federal board, cases concerning the Council can be heard only in a Federal Court. Provincial courts do not have jurisdiction over the Council. However, they do have jurisdiction over the “Band” itself, and individual “Band” members.

COUNCIL ELECTIONS

Two processes under the *Indian Act* by which community members choose their leaders are “Band election” and “election by Band custom.” Band elections are discussed more fully below. Usually, however, the Band election process (s.74(1)) requires community members to elect by majority vote one Chief only, and one councillor for every one hundred Band members. Furthermore, the number of councillors shall not be less than two nor more than twelve, and no Band shall have more than one chief. About half of all First Nation Councils across Canada hold elections according to the *Indian Act* (s.74-80).

²³ *Gabriel v. Canatonquin* [1981] 2 F.C. 792, [1981] 4 CNLR 61 (Fed. C.A.).

Election by Band Custom

The process for election by Band custom is not set out in the *Indian Act*, and may vary from Band to Band. The courts have said that custom elections arise out of the inherent power of the Band, not from a delegation under the *Indian Act*.²⁴ While the *Indian Act* does not require a referendum to adopt a community election code for custom elections, an INAC policy does. Establishing a custom election process must be based on a “broad consensus” of First Nation members, which may be achieved in several ways, including a referendum.

Thus, First Nations have the option of selecting leaders by their custom. Most First Nations using custom were never placed under the electoral provisions of the *Indian Act*. Others conduct custom elections using codes developed in accordance with INAC policy, after having chosen, with the consent of a majority of electors, to opt out of the *Indian Act*.

Like elected Councils, Councils selected by Band custom are agents or trustees for community members. Custom Councils therefore have a fiduciary obligation to act in the best interests of the members. Because custom Councils may not have a legal framework within which to work, developing their own constitution, by-laws and policies would be wise.

Since the *Indian Act* election provisions do not apply to “custom Bands,” they should develop their own rules for leadership selection, Council discipline, and conduct of community meetings and Council meetings. This will help reduce the controversy, and court cases, that sometimes occur where rules do not exist, or are unclear. Again, the only parts of the *Indian Act* that do not apply to custom Band Councils are those dealing with elections and related procedures.

Elections under the *Indian Act* (s.74)

“Bands” choosing their leaders by election under the *Indian Act*, unless otherwise ordered by the Minister, must be composed of one Chief, and one councillor for every 100 members. However, a Band can have only one Chief councillor, and the number of councillors cannot be less than two, nor more than twelve. The *Act* prescribes rules governing:

- The conduct of elections
- Eligibility to stand for office
- Eligibility to vote
- Length of term of office
- Vacancy of office
- Election appeals
- Rules for the conduct of Band meetings and Council meetings

²⁴ *Bone v. Sioux Valley Indian Band*, 1996, 3 CNLR 54 (Fed. T.D.).

MEMBERSHIP

Since the 1985 enactment of *Bill C-31*, Band membership has been managed by either INAC or individual Bands, in separate lists, as follows:

- Indian Register, where INAC lists all individuals entitled to Indian status
- Band List, where a Band assuming control of its membership, lists the name of every person who is a member of that Band

Bands not controlling their own membership are subject to the membership provisions of the *Indian Act* (s. 5). Under the provisions, a person registered as an Indian and belonging to a particular Band is automatically a member of that Band. INAC will continue to maintain the Indian Register for Bands “until such time as a Band assumes control of its Band List (s. 9(1)).

Because of *Bill C-31*, the *Indian Act* permits a community to “assume control of its own membership (s. 10(1)).” Assuming control first requires the Band to:

- Write its own membership rules according to the Act
- Give appropriate notice of its intention to members and to the Minister
- Obtain the consent of a majority of Band electors
- Provide mechanisms for reviewing decisions on membership

For a Band assuming control of its membership, the fact that INAC’s Indian Register names a person does not automatically entitle that person to membership in the Band.

Residency

The *Indian Act* entitles Council to enact a by-law on who is entitled to reside on the reserve. The Powers of the Council section (s. 81(1)) includes:

- Residency criteria (s. 81(1) p. 1)
- Rights of spouses and dependent children (s. 81(1) p. 1)²⁵

LAND MANAGEMENT

While reserve land is finite, Band populations are rising, increasing the demand for housing, social services, and economic development. The diminishing availability of Band land compels Councils to develop management plans to ensure they put reserve lands to best use. The by-law powers of Council help Council to:

- Zone the reserve (s. 81(1)(g))
 - Regulate construction, repair and use of buildings (s. 81(1)(h))
 - Survey and allot reserve lands among Band members (s. 81(1)(i))
 - Set apart reserve lands for common use (s. 18(2); s. 60; s. 81(1)(i))
- Example: schools, administration buildings, health centres, community centres, parks, public works buildings, and fire and police stations

²⁵ Carswell. Consolidated Native Law Statutes, Regulations and Treaties, 2000, pp. 36-7.

Off-reserve Band-owned lands are not subject to the *Indian Act*. Still, Council should develop policies and procedures for managing such lands. Unlike reserve lands, for example, off-reserve lands are not subject to decisions by referendum. Without policies and procedures for managing off-reserve lands, Council decisions may prejudice community and individual rights.

Trespass

The *Indian Act* does not define “trespass.” Thus, common law principles with respect to trespass on non-Indian lands are generally used to decide whether trespass has occurred on reserve. Trespass simply means being on an Indian reserve without a lawful reason or excuse.

Visitors invited specifically by a Band member, or by general invitation, have a lawful reason for being on the reserve. They become trespassers, however, if they remain on reserve after the invitation has ended. Unresolved questions regarding trespass include the following:

- Can a non-resident Band member be a trespasser?
- Can the non-member spouse of a Band member be a trespasser?
- Can a resident member trespass on another resident member’s Certificate of Possession land?

The *Indian Act* deals with trespass in two sections: Penalty for Trespass (s. 30), and By-law Powers of Council for the removal and punishment of trespassers (s. 81(1)(p)). Although the Federal government’s penalty in s. 30 seems to conflict with a penalty the Band Council may levy in s. 81, they probably do not because section 81(1)(p) is based on a by-law while s. 30 is not. In any event, any conflict between the two sections would be resolved through the rules of statutory interpretation. Because of the seeming confusion, Council should seek legal advice when dealing with trespass matters.

Certificate of Possession (CP)

A Certificate of Possession provides legal evidence of a Band member’s right to possess land allotted to him by Band Council (s. 20(1) and (2)). Council cannot revoke the interest of a CP holder without her consent. The Band member can transfer or will the CP to heirs, sell to other Band members or to the Band, or request the Minister to lease the land.

Nevertheless, the *Indian Act*, other federal statutes, or Band by-laws may restrict the member’s use of the land. For example, Council can restrict the CP holder with zoning by-laws, building codes and sewage or garbage disposal. Federal environmental laws may also apply.

Lease Designations

Until 1988, Bands could not lease Band lands without an absolute surrender. After 1988, the “Kamloops Amendment (s. 37(2))” allowed First Nations to retain reserve status over designated lands by conditional surrender. The amendment

allowed Bands to enact by-laws for the benefit of members when nonmembers lease, develop and use those lands. In this way, leased lands give Bands investment opportunities, revenue and employment.

A reserve designation requires Band members to approve the proposed business arrangement in a referendum. Once approved by the Minister, INAC officials complete the leasing process. Typical designations include land leased for shopping malls, hotels, office complexes, residential development, factories, recreational facilities and the harvesting of natural resources.

ENVIRONMENTAL PROTECTION ON FIRST NATIONS RESERVE LANDS

As First Nations Councils assume more control over the management of reserve lands, Council should know about its responsibility to protect the natural environment. Management of reserve lands comes under federal jurisdiction, and federal laws apply. Therefore, Council can apply federal laws and regulations when dealing with environmental problems on reserve lands. These laws and regulations set environmental standards or create statutory mechanisms that allow Council to be self-governing with regard to environmental issues on their lands (e.g. the *First Nations Land Management Act*).

Besides the *Indian Act*, three federal environmental statutes are important to First Nations: the *Canadian Environmental Protection Act, 1999*, the *Fisheries Act* and the *Canadian Environmental Assessment Act*. Council should also be aware that contractual obligations exist as terms and conditions in funding arrangements and in land tenure instruments. These terms and conditions are meant to ensure compliance with existing federal legislation.

Because reserve lands and resources are finite, Council should consider the development of “best practices” in environmental management, especially in decision making about land management and reserve operations. As environmental protection is in the community’s best interest, proper consideration of environmental issues will ensure the health and safety of reserve lands now and for future generations.

ESTATES

Indians can write a will to provide for the division and transfer of their property after death. Because reserve land interests are unique, it is especially important that Indians make a will. This ensures that survivors respect the deceased’s wishes, and that there will be an orderly distribution of the estate.

A family dispute may result from not making a will when land is involved. The dispute occurs because family members may disagree about who should manage and occupy the deceased’s property. Such disputes may take years to resolve. Often, they create acrimony in the family and never get settled.

Sections 42 to 50 of the *Indian Act* deal with the estates of deceased Indians. Briefly, the Minister has estate powers normally exercised by a provincial court. The Minister may also appoint an INAC employee or agent to administer an estate. INAC employees once administered most Indian estates. Recently, departmental policy encourages a family member to be administrator. This reduces the department's involvement, and gives the family privacy in sensitive matters.

Generally, *Indian Act* estate provisions are similar to provincial laws, except those that deal with reserve land. For example, only persons who are entitled to reside on reserve can inherit Band land in an estate distribution.

MANAGEMENT OF INDIAN MONEYS

The *Indian Act* defines Indian moneys as: *all moneys collected, received or held by Her Majesty for the use and benefit of Indians or Bands* (s. 2(1)). INAC holds Indian moneys in trust in the Consolidated Revenue Fund (CRF) and administers the Fund.

The Governor in Council controls Indian moneys and interest there derived, subject to *Indian Act* provisions (s. 61(1) and (2)). The Minister manages, expends or releases Indian moneys with Council consent. The *Indian Act* specifies how this is done. The source of Indian moneys is defined in the *Indian Act* as:

Capital Moneys

All Indian moneys derived from the sale of surrendered lands or the sale of capital assets of a Band, as, for example, the sale of non-renewable resources: timber, oil, gas, sand, or gravel.

Revenue Moneys

All Indian moneys other than capital moneys, as for example:

- Interest earned on Band capital or revenue moneys
- Sale of renewable resources (e.g. crops)
- Lease revenues (cottages, residential subdivisions, agricultural purposes)
- Rights-of-way revenues

While the requirements for the release of capital moneys are sometimes believed to be more restrictive than for revenue moneys, this is not so. For example, Section 64(1)(k) of the *Indian Act* allows expenditures of capital to be made “*for any other purpose that in the opinion of the Minister is for the benefit of the Band.*”

Generally, Council may use revenue moneys for any purpose that promotes the general progress and welfare of the Band or any member of the Band. Under the *Indian Act*, the Governor in Council may make an order to “*permit a Band to control, manage and expend in whole or in part its revenue moneys*” (s. 69). This allows Council, rather than INAC, to decide whether a particular expenditure is in the best interest of the Band.

Moneys generated from off-reserve Band lands and businesses are not Indian moneys. Accordingly, *Indian Act* provisions do not cover them. Because Band members have a proprietary interest in this revenue, they are entitled to be informed about such matters, and to participate in major decisions. Furthermore, there is an onus on Council to determine that there will be a benefit to the First Nation when using any revenue available to the community. Council should therefore develop its own processes to deal with the receipt, deposit and expenditure of such funds.

GOVERNOR IN COUNCIL REGULATIONS

Under the *Indian Act*, the Governor in Council regulates provisions other than Indian moneys. Governor in Council regulations have priority over Band and provincial laws. The Governor in Council also has the power under the *Indian Act* to make regulations over certain subjects, such as estates, elections, Band council meetings, and granting licenses to cut timber. Appendix F contains a partial list of provisions regulated by the Governor in Council.

Council By-Laws

The *Indian Act* authorizes Band Councils to enact by-laws under sections 81, 83 and 85.1. Each section requires Council to follow specific, separate procedures for the by-laws to come into force. These by-laws are enforceable within the boundaries of the Band's reserves, and apply to all persons, Band members or otherwise, when they are on the reserve.

A Council may decide to develop by-laws for many reasons, including:

- Public safety (e.g. traffic, animal control)
- Use and protection of Band assets (e.g. housing, land use, fencing, collection and disposal of garbage)
- Raising revenue while protecting Band assets (e.g. use and access to a developed campsite area)
- For administrative reasons (e.g. financial administration, decision-making processes, conduct of meetings, creation of committees)

A Council assumes law-making responsibilities when it exercises its Section 81, 83 or 85.1 jurisdiction. Council's law-making responsibility includes:

- Identifying the issues to be covered by the by-law
- Drafting the by-law
- Enacting the by-law
- Arranging for the enforcement of the by-law
- If challenged, defending the by-law in court
- Amending the by-law if necessary

By-laws must comply with the provisions of the *Indian Act*. In some situations, they may take precedence over other federal or provincial regulations, but not over federal/provincial statutes. As with any law, members and other groups or

individuals may challenge Band by-laws in the courts. As noted earlier, while there is a cost to developing legislation, the benefits, both economic and social, to the community must also be considered.

Section 81 lists seventeen purposes for enacting by-laws. Rather than list the purposes, it is suggested that Council follow the process below if considering a by-law:

- Contact the Band Governance unit of the INAC Regional Office for information
- Identify:
 - The problems to be addressed
 - Possible solutions
 - The applicable s. 81 section(s)
 - By-law content
 - How Council intends to enforce the by-law (e.g. policing, charging violators, prosecution in court, collection of fines)
- Draft the by-law with expert assistance
- Ensure that the by-law:
 - is consistent with the *Indian Act*
 - applies only on the reserve
 - is *Charter* compliant
- Make the draft by-law available to members and other affected parties for discussion about its possible impacts
- Enact the by-law, having it moved, seconded, discussed and adopted by majority vote at a duly convened Council meeting
- Forward a signed copy of the by-law by registered mail to the INAC Regional Office within four days of the meeting
- Wait forty days from the date of mailing to see if the by-law has been disallowed by the Minister. If not disallowed, the by-law comes into effect. INAC will inform the Band of the effective date of the by-law
- Provide certified copies of the by-law to all officials who may be involved in the enforcement of the by-law. For example, to the police, by-law enforcement officer, provincial court administrator, provincial prosecutor, Band prosecutor, provincial court judges

A Council wishing to enact a s. 83 by-law (taxation of interests in land, business licensing, and expenditure of revenues raised under such by-laws) should contact the Indian Taxation Advisory Board. The Board will give Council detailed advice about the process and content of such by-laws. Also, the Board has information packages, sample by-laws and advisors to help councils on request. INAC also has a by-law advisory service that is available to First Nations without cost, and sample by-laws are also available.

By-laws under s. 85.1 (prohibition against sale or possession of intoxicants and public intoxication) also have a special procedure, including a special meeting of the electorate. Councils considering an intoxicant by-law may want to contact the Band Governance unit at their INAC Regional Office to obtain detailed information about this process.

Council Governance Policy Manual

A Council policy manual (unlike a policy manual for administrative staff) should define the roles, responsibilities and accountability of Council members, the Council as a whole, and the Director of Operations. This policy framework (with the acronym PLOC) has four parts: Planning, Leading, Organizing and Controlling. These are explained below.²⁶

- **Planning**

These policies state Council's purpose, vision and values for the First Nation. They remain constant over the Council's term of office. Each year the Council, with the Director of Operations, decides what it wants to accomplish for the year. Council's yearly objectives focus the work of the Director of Operations and staff. They hold the Director accountable for achieving results.

- **Leading**

These policies contain the rules that Council follows to manage Council business. They include the process of policy development, Council's annual agenda, and reporting procedures. They contain an orientation process for new Council members.

- **Organizing**

These policies explain how the Council interacts with the staff, and vice versa. They also contain the rules and procedures for appraising and evaluating the Director of Operations.

- **Controlling**

These policies define the limits Council places on the Director's authority. The Director may take any prudent and legal action that does not exceed these limits. The limitations policies are the expression of trust that Council has in the ability of the Director of Operations to manage the First Nation's business.

Policies like these are useful to orient new Council members. They ensure that the Director of Operations is effective and achieves Council's goals. They prevent Council from becoming too involved in the day-to-day operation of the office, while making sure Council governance is appropriate and efficient. The policies below are selected to illustrate how Council governance policies work. Being examples, they do not cover the full range of policies Council might develop in its own Council Policy Manual.

²⁶ We adapt this policy framework from Carver (see *Boards That Make a Difference* (1997), and *Reinventing Your Board* (1997)). Carver's model does not distinguish the "grey zone" inherent in overlapping relationships between Council, staff, and the membership. We offer the Carver model here solely to illustrate that leaders' governance policies differ from staff policies and procedures.

SELECTED COUNCIL GOVERNANCE POLICIES

A. Planning

A1 Core Purpose

Council's purpose is a healthy, successful community in which all members can safely live, work, learn and play at a reasonable cost.

A2 Vision

Our First Nation vision is self-reliant community members having choices in education, employment and economic opportunity.

A3 Values

Our values require Council to:

1. Have a constant focus on our First Nation community.
2. Support the involvement of all community members who desire to participate in advancing our community.
3. Respect our history and culture.
4. Respect various perspectives, opinions and beliefs.
5. Wisely use a variety of resources to achieve the goals of our First Nation.

B. Leading

B1 Governing Style

The governing style of Council is to focus on leadership that will emphasize:

1. The future.
2. A clear separation between the roles of the Council and staff.
3. Being pro-active rather than reactive.

In this spirit Council will:

1. Be accountable to community members for competent, conscientious and effective accomplishment of its obligations as defined in our purpose and values. Council will allow no Councillor, individual or committee of Council to take over this role or to discourage discipline.
2. Keep Council's major involvement to the long-term impact of the Council, not to the administrative or program means of achieving results.
3. Direct, control and inspire the First Nation by carefully studying and establishing Council policies.
4. Initiate policy and not merely react to staff initiative.
5. Enforce upon Council whatever discipline is needed to govern with excellence. Discipline will apply to:
 1. Attendance.
 2. Treating individual Council members with dignity and respect.
 3. Respect for the role of the Council.
 4. Respect for the role of the Chief Councillor.
 5. Speaking with one voice.
 6. Self-policing when members stray from good governance.
6. Monitor and regularly discuss Council's own process and performance.

B2 Council Orientation

The purpose of orientation is to acquaint each Council member with the First Nation, the Council, and the job of the individual Council member. Orientation will be an ongoing process.

1. Orientation to the First Nation

Orientation to the First Nation will cover the following:

1. The broad general scope of the First Nation, including Council's purpose, vision, values, history, and programs and services of the Council.
2. The roles, responsibilities, relationships and structure of all levels of the First Nation operation.
3. The legislation that affects the First Nation, including its constitution and by-laws.
4. An initial orientation should be done before the first Council meeting. A Council members' manual will be prepared. It will contain the above information, and the past Chief Councillor will review the Council information while the Director of Operations will review information about the operation of the First Nation office.

2. Orientation to the Council

1. This orientation will be done before or at the first meeting of new Council members. A discussion of topic items by all Council members will help re-orient incumbent Council members and introduce new Council members to Council's Policy Manual. Supporting information will be distributed at this meeting to be inserted into the Council Policy Manual. Discussion will focus on five areas:
 1. The role of Council members as a governing unit.
 2. The importance of the Council and its contribution to meeting the needs of First Nation members.
 3. A review of Council's governance model, governance policies, and the basic values underlying the work of Council.
 4. An introduction to Council's Annual Agenda.
 5. Council's relationship with other organizations, groups and government.

3. Orientation to the Individual Role of the Council Member

1. The expectations of individual Council members should include:
 1. The specific responsibilities, expectations and benefits of the Council job.
 2. The level of authority and accountability of individual Council members.
 3. The roles of committees and the resources available to committee members.
 4. How reporting and communicating occurs within Council and between Council members.
 5. The performance expectations for individual Council members.

This part of the orientation could be handled in a less formal way away from the Council table.

B3 Code of Conduct

Chief and Council are expected to conduct themselves in an ethical, legal and professional manner. This expectation includes proper use of authority and appropriate group and individual behaviour. Thus,

1. Loyalty

All councillors, including the Chief, must be loyal to the interests of all First Nation members. This loyalty supersedes:

1. Any advocacy or special interest groups, and membership on other Boards or staffs.
2. The personal interest of any Council member acting as an individual user of the First Nations programs and services.

2. Conflict of Interest

Councillors must avoid any conflict of interest with respect to their fiduciary responsibility. Therefore,

1. There must be no self-dealing or any conduct of private business or personal services between any Council Member(s) and the First Nation unless controlled by procedures to ensure openness, competitive opportunity and equal access to otherwise “inside” information.
2. If a Councillor is to be considered for employment, she or he must temporarily withdraw from:
 1. Council deliberation.
 2. Voting and access to applicable Council information.

3. Employment

Should a Council member become employed by the First Nation (on salary or contract), the Councillor will resign or take a leave of absence during employment.

4. Authority

Council Members, including the Chief, may not attempt to exercise individual authority over the organization except as explicitly set forth in Council policies. Therefore,

1. Individual Councillors or groups of Councillors must recognize that they have no authority to direct the Manager or staff except as noted in other policies.
2. Except for the authority granted to the Chief Councillor, Councillors must recognize that they have no authority to interact with the public, the media and other entities for Council.
3. Council Members will make no judgement of the Manager or staff performance unless that performance is assessed against explicit Council policies by the official process.
4. Council Members will respect both approved signing authorities and approval processes, for example, Band council resolution, contracts, purchases and payments.

5. Confidentiality

Council Members may not use Council information for their own direct benefit or advantage. This requires that information be kept confidential whenever required in the best interests of the organization. Therefore,

1. The minutes, records or proceedings of any “in camera” Council or committee meeting will be kept in confidence by every Council member, every committee member and by the Director of Operations, or other person invited or permitted to attend the meeting.

6. Communications

Council Members will deal with outside entities or individuals, with staff, and with each other fairly, ethically and with straightforward communication.

7. Procedure

All Council members must carry out their duties in good faith with a reasonable degree of diligence, care and skill. If a Council member, including the Chief, is deemed to be negligent in carrying out his or her duties, Council has the right to make and enforce its own rules and punish an offender. In such circumstances, the following guidelines will be followed.

1. Offending Council members may be censured by the Chief councillor, or other Council member representing Council, with a letter being sent to the member outlining the circumstances and corrective actions.
2. Continued offense will result in a motion of censure being brought to the Chief Councillor. This motion may result in a voluntary withdrawal, or upon a vote of the majority, the member will be removed from all committee membership.
3. Continued offense by a member of the Council will result in removal from office by a resolution as prescribed in the by-laws of First Nation Council.
4. In circumstances of an extreme nature the offending member will be removed from office immediately according to the by-laws.

C. Organizing (Council’s Relationship with the Director of Operations)

C1 Delegation to the Director of Operations

The Council will instruct the Director of Operations through written policies that describe the goals to be achieved and situations and actions to be avoided. This allows the Director of Operations to use any prudent, ethical, reasonable interpretations of these policies. Therefore:

1. The Director of Operations is authorized to decide, take all actions and develop all activities that are true to Council’s governance policies.
2. The Council will respect the manager’s choices and decisions if a policy is absent. By adding to its policies, the Council may rescind areas of the Director of Operations’ authority anytime.
3. The Director of Operations will inform the Chief Councillor in a memorandum when a Limitations policy has been contravened.
4. The Director of Operations, by reporting to the Chief, guarantees that no contravention is intentionally kept from Council.
5. The Director of Operations will also report contraventions to the Council as part of his or her normal reporting. This does not exempt the Director from subsequent Council judgement of the action.

C2 Unity of Control

Only decisions of the Council acting as a body are binding on the Director of Operations. Accordingly:

1. Decisions or instructions of individual Council members or committees are not binding on the Director of Operations except in rare situations when the Council has specifically authorized the exercise of such authority.
2. If Council members or committees request information or assistance without Council authorization, the Director of Operations can refuse those requests that require (in the opinion of the Director of Operations) a material degree of staff time or funds, or are disruptive.
3. The Director of Operations is the Council's only link to administrative achievement and conduct. All authority and accountability of staff are therefore considered to be the authority and accountability of the Director of Operations. Therefore:
 1. The Council will never give instructions to persons who report directly or indirectly to the Director of Operations.
 2. The Council will refrain from evaluating, either formally or informally, any staff other than the Director of Operations.
 3. The Council will view the Director of Operation's performance as identical to the performance of the First Nation office. Therefore, the accomplishment of Council's stated goals and the observance of Council's Limitations Policies will be viewed as successful Director of Operations performance.

D. Controlling (the Director of Operations and Staff)

D1 Operational Practices

When performing his or her duties, the Director of Operations will not cause or allow any practice, activity, decision or organizational situation which is unlawful, imprudent, or violates the commonly accepted business and professional ethics of the First Nation.

D2 Administration

While Council knows it has the final responsibility for the performance of the First Nation, it must be free of day-to-day operations. Council therefore supports the principle of delegation to the Director of Operations.

To promote the utmost performance, the Council leaves achievement of staff policy development to the Director of Operations. These policies must guide the Director of Operations. Within the limits of these policies, the Director of Operations may not operate without:

1. Administrative policies and procedures that ensure operational and administrative smoothness and consistency.
2. Publishing these procedures and making them appropriately available to all staff.
3. A procedure that limits conflict of interest to ensure openness, competitive opportunity, and equal access to otherwise "inside" information.

D3 Staff Treatment

With respect to the treatment of paid and volunteer staff, the Director of Operations will not cause or allow working conditions that are unfair or undignified. Therefore the Director of Operations will not:

1. Operate without written personnel policies that:
 1. Clarify personnel rules for all staff.
 2. Provide for the effective handling of disputes.
 3. Protect against wrongful conditions such as nepotism, sexual harassment, and grossly preferential treatment for personal reasons.
 4. Do not discriminate against any staff member for expressing an ethical dissent.
 5. Do not prevent staff from grieving to Council when:
 1. Internal dispute procedures have been exhausted, and
 2. The employee alleges either that:
 1. Council policy has been violated to his or her detriment, or
 2. Council policy does not adequately protect his or her human rights.
 6. Acquaint staff with their rights under this policy.

D4 Fiscal Planning Policy

With respect to planning financial matters, the Director of Operations will not depart significantly from Council's stated strategic goals or jeopardize the fiscal standard of First Nation Council. Thus, the Director of Operations cannot:

1. Permit accounting and reporting systems to operate outside generally accepted accounting principles (GAAP).
2. Plan the expenditures in any fiscal year of more operating funds than are conservatively projected to be received in that period.
3. Produce a budget which contains too little information to allow:
 1. A reasonably accurate projection of revenues and expenses.
 2. A reliable cash flow projection.
 3. Subsequent audit trails.
 4. Planning assumptions.
4. Reduce current liquid assets to below a level to meet the First Nation's current liabilities.

D5 Financial Condition and Activities Policy

The Director of Operations will oversee the First Nation's finances in a sound and prudent way. Therefore, the Director of Operations will not allow financial risk to develop, nor jeopardize his or her ability to allocate funds with integrity. Thus, the Director of Operations will not:

1. Commit nor expend more funds than have been provided for in the duly approved budget.
2. Indebt the First Nation beyond any levels provided for in the duly approved budget.
3. Use any long term reserves without authorization through the duly approved budget.
4. Conduct inter-fund transfers to a greater amount than can be restored by uncommitted revenues within thirty days.
5. Fail to settle payrolls and debts quickly.

6. Allow tax payments or other government ordered payments or filings to be overdue or inaccurately filed.
7. Make a single purchase or financial commitment of greater than \$_____.
8. Acquire, encumber or dispose of real property.
9. Fail to aggressively pursue receivables after a reasonable grace period.

D6 Asset Protection Policy

The First Nation's assets must be properly cared for, including property, equipment, membership lists, and computerized data. The Director of Operations will not allow First Nation assets to be unprotected, inadequately maintained, or unnecessarily risked. Thus, the Director of Operations will not:

1. Fail to insure against theft and casualty losses to at least 80% of replacement value.
2. Fail to insure against liability losses to Council members, staff, and the First Nation itself in no greater amount than the average for comparable operations.
3. Allow nonbonded personnel access to material amounts of funds.
4. Subject plant and equipment to inadequate maintenance and improper wear and tear.
5. Unnecessarily expose the First Nation, its Council, or staff to claims of liability.
6. Make any purchase:
 1. Where normally prudent protection has not been given against conflict of interest.
 2. Of more than \$_____ without a strict method of ensuring a balance between cost and long-term quality.
7. Fail to protect cultural and intellectual property, information and files from loss or significant damage.
8. Receive, process or spend funds under controls that are insufficient to meet Council's appointed auditor's standards.
9. Invest or hold operating capital in insecure instruments, including:
 1. Uninsured checking accounts and bonds of less than AA rating.
 2. Non-interest bearing accounts.
10. Endanger the First Nation's public image or credibility, particularly in ways that would hinder its accomplishment of strategic goals.

General Principles for Establishing Council Committees

- Council should create committees for specific and time-limited purposes, according to predetermined terms of reference.
- Council should review all committees at least annually to decide if they should continue or be revised. Committees serving no useful purpose should be canceled.
- Council committees are to help Council, not the First Nation administration, do its job. Committees commonly help Council by preparing policy alternatives and implications for council deliberation.
- Council committees do not speak or act for Council unless formally given the authority to do so. Council must carefully define the committee's authority so as not to conflict with that delegated to the Director of Operations.
- Council committees must not exercise authority over First Nation staff unless specifically authorized by Council to do so.
- Consistent with Council's broader focus, council committees should not deal directly with the administrative First Nation operation.
- Council should be careful to distinguish between committees established to develop policy (e.g. Education Policy Committee), and those established for regulatory or operational purposes (e.g. School Board).
- The names of Council committees should be obvious, based on their form and function, for example: it is clear what the mandate of each of the following committees is:
 - Housing Policy Committee
 - Housing Board (or Housing Authority).

Sample Terms of Reference for Establishing a Committee

Example: Eagle River First Nation Finance Committee

1. Purpose

To oversee the financial health of Eagle River First Nation

2. Committee Type

Standing Committee

3. Committee Outputs

- a. To recommend to Council:
 - Its annual budget
 - The approval of monthly financial statements
 - The appointment of the auditor and audit guidelines
 - Acceptance of the annual audit
 - Financial guidelines and policies
 - To monitor financial guidelines and policies
- b. To explain significant changes in budgetary amounts and financial condition

4. Appointment of the Chair

The Chief shall appoint a Council member as Chair of this Committee

5. Committee Members

- a. Committee members are to be from the Council and the community
- b. The Chief sits as a voting ex-officio member of the Finance Committee
- c. The Finance Committee will have a total of five persons

6. Meeting Dates

The Finance Committee will meet at a regularly scheduled time as determined by the Finance Committee Chair

7. Resources

- a. Staff will provide support to the Finance Committee as non-voting members, and as directed by the Director of Operations
- b. The Director of Operations will ensure that the Finance Committee has funds as needed to conduct its work

Indian Band Council Procedures Regulations (BCPR)²⁷ for the Conduct and Content of Council Meetings

- Meetings of the Council

- Council should hold its first meeting within the month after its election (BCPR 3 (1))
- Each councillor gets adequate notice in writing of meeting dates, time and location (BCPR 3(1))
- Council should hold subsequent meetings routinely, as necessary to conduct its business (BCPR 3(1))
- No Council member may be absent for 3 consecutive meetings without being so authorized by Chief and Council (BCPR 3(2))
- The Chief may call an emergency or special meeting anytime, and must do so if requested by a majority of the Council (BCPR 4)

- Chairperson

- The chairperson, if not the Chief, should be chosen at the first meeting (BCPR 8; 9(2))

Suggestion: Councillors may rotate the chair. Some First Nations do this so the chief can participate in deciding issues. Also, it helps councillors learn to organize and conduct meetings. Also, some Councils have the Director of Operations chair so all councillors can participate in the meeting.

- Quorum

- Unless *Procedure Regulations* (or Custom Band rules) state otherwise, a majority of the whole Council is the quorum, except where a Council consists of nine or more members, five members is a quorum (BCPR 6)
- Example A: the quorum for a Council of eight to twelve members is five members.

In other words, if the Chief and any four councillors, or five councillors, are present at the time and place specified for the meeting, the meeting can be legally convened.

- Example B: the quorum for a Council of seven members, including Chief, is four members.

²⁷ Appendix D is adapted from Carswell, with examples and suggestions to assist the reader. For complete regulations, see Carswell, *Consolidated Native Law Statutes, Regulations and Treaties 2000*, pp. 57-61.

In other words, if the Chief and any three councillors, or four councillors, are present at the time and place specified for the meeting, the meeting can be legally convened.

- If a quorum is not present within one hour of the time appointed for the meeting, the secretary records the names of the members present and the Council adjourns until the next meeting (BCPR 7)

- **Absence or Tardiness of the Chair**

If the chairperson will be absent or late, either the Chief or a councillor appointed by those members present may act as chairperson until that person is able to be present (BCPR 9(2))

- **Duty of the Chairperson**

- The chairperson is responsible for maintaining order during the meeting, recognizing speakers, and deciding all questions of procedure (BCPR 11)
- The chairperson shall determine who is entitled to speak at any point during the meeting (BCPR 15)
- The chairperson shall not vote except when there is a tie vote, in which case the chairperson shall cast the deciding vote (BCPR 18(2))
Suggestion: It is very helpful if the chair summarizes participants' discussion from time to time. This assists members to deal with the immediate business at hand.

- **Councillors' Duties**

- Councillors wishing to speak should address their remarks to the chairperson and confine their remarks to the subject being discussed at that time (BCPR 14)
- Any councillor may appeal a decision of the chairperson to the councillors present, and all appeals shall be decided by a majority vote and without debate (BCPR 17)
- All decisions to be made by the Council must be decided by a majority of the councillors present (BCPR 18(1))
- All councillors present shall vote, unless they have a conflict of interest in relation to the question, in which case they shall be excused from voting (BCPR 19)
- A councillor who refuses to vote shall be deemed to vote in the affirmative (BCPR 20)
- On every vote taken, councillors shall announce their vote individually and openly. When requested by any member, the secretary shall record the vote (BCPR 21)

- **Order of business at regular meetings (BCPR 11)**

- Reading, correcting and adopting the minutes of the previous meeting
- Unfinished business from the previous meeting
- Presentation and reading of correspondence
- Presentation of financial statements from the previous month and accounts payable for approval
- Presentation and consideration of reports and petitions

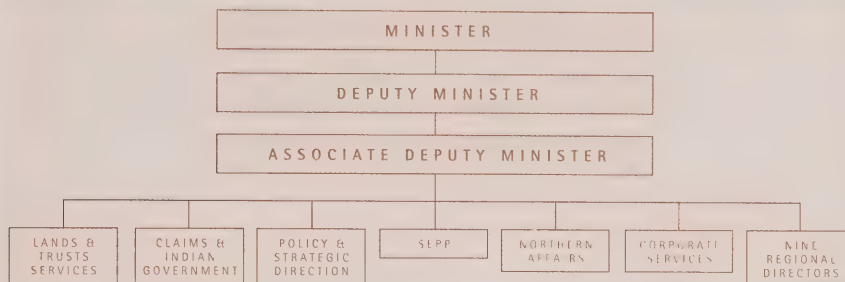
- Presentations from individual First Nation members or groups
 - New business
 - Adjournment
- **Members' Participation in Council Meetings**
 - Except for discussions that may be sensitive or fall under the Privacy Act, regular meetings should be open to First Nation members
 - Notwithstanding the need to properly deal with sensitive issues or privacy matters, and except for improper conduct, a member should not be excluded (BCPR 23(1))
 - The chairperson may expel or exclude any person who causes a disturbance at a meeting (BCPR 23(2))

Suggestions: Meetings may be closed to the public (i.e. in camera) when Council discusses sensitive topics.

Council must file the minutes of "in camera" meetings in a secure place. These minutes are closed to the public.
 - **Agenda (suggestions only, not in BCPRs)**
 - The chairperson and the Director of Operations should prepare an agenda for each meeting
 - The agenda lists the order of items to be discussed and resolutions to be considered
 - The agenda, minutes of the previous meeting and background information should be distributed early enough that councillors have an opportunity to prepare for the meeting properly

INAC Organization

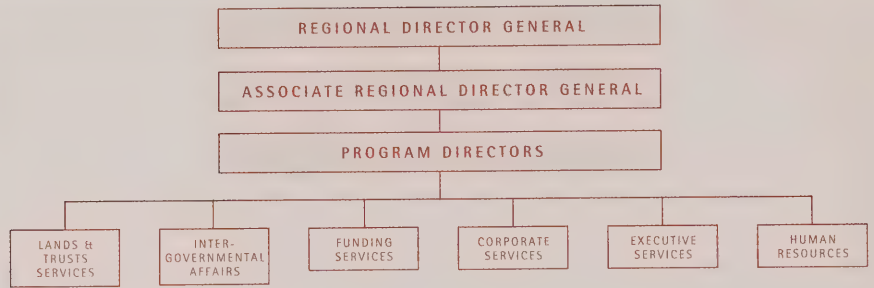
HEADQUARTERS



The major activities likely to be of interest to the reader are grouped at the head-quarters level as:

- Lands and Trust Services
 - Land management
 - Environment and natural resources
 - Registration
 - Management of capital and revenue trust funds
 - Band governance (by-laws and elections) and estates
 - Indian Oil and Gas Canada
 - Indian Taxation Advisory Board
- Claims and Indian Government
 - Comprehensive claims
 - Specific claims
 - Litigation support
- Policy and Strategic Direction
 - Management of long-term strategy and the related policy agendas including treaty policy, inherent right policy, self-government and specific policy initiatives
- Socio-Economic Policy & Programs (SEPP)
 - Includes Housing, Education, Youth Employment, Economic Development and Social Assistance

REGIONAL OFFICES



Bearing in mind that not all regional offices are organized in the same way, the major activities most likely to be of interest to the reader are grouped at the regional level as follows:

- **Lands and Trust Services**
 - Band governance (by-laws and elections) and estates
 - Registration
 - Indian moneys
 - Land management
 - Environment and natural resources
- **Intergovernmental Affairs**
 - Specific claims
 - Comprehensive claims
 - Self-government and inherent right
- **Funding Services**
 - Negotiation and on-going management of financial arrangements
 - Capital projects

Governor in Council Regulations

- **Calculation of Interest Regulations**
For calculating interest for persons ceasing to be Band members (s. 64.1(1) and (2))
- **Disposal of Forfeited Goods and Chattels Regulations**
For the disposal of forfeited goods (s. 103(3))
- **Elections of Chiefs and Band Councils Regulations**
For electing Chiefs and Councillors under the *Indian Act* in one or more electoral section (s. 74.1(3) and (4); s. 76.1; s. 79)
- **Indian Band Election Regulations**
Determining under section 74 the eligibility of voters, the nominating meeting, voting method, conducting the poll, disposing of ballot papers, appeals and voting secrecy
- **Indian Band Council Procedure Regulations**
For the conduct of Band council meetings where the council is elected under s. 74 of the *Indian Act*
- **Indian Estates Regulations**
Rules for administering the estates of deceased Indians who, prior to death, were ordinarily resident on reserve. Includes rules for notice of death, taking inventory, probate, application for administration, affidavits, advertising for creditors, heirs and other claimants, executors, sureties, administrators' powers and duties, land transfer, absent or missing heirs, deeming a woman to be a widow, requirements for a valid will, and other forms
- **Indian Mining Regulations**
Rules for disposing of minerals underlying reserve lands
- **Indian Referendum Regulations**
Rules for referenda determining whether Band members favour a proposed surrender or designation
- **Indian Reserve Traffic Regulations**
Rules for operating vehicles on reserve
- **Indian Reserve Waste Disposal Regulations**
Rules for storing or disposing of waste, including permits: burning prohibitions, orders, compliance with orders, cancellation of permits, and penalties

- Indian Timber Regulations
Rules for cutting timber on reserves
- Indian Band Revenue Moneys Regulation
Rules for the control, management and expenditure of revenue moneys

Internet and E-mail Support

FEDERAL PROGRAMS AND SERVICES

Indian and Northern Affairs Canada
Programs and Services

Internet: www.inac.gc.ca
Click on "Programs and Services"

Other Federal Programs and Services

Internet: www.inac.gc.ca
Click on "Other Federal Programs and Services"

Publications and Public Enquiries

E-Mail: InfoPub@inac.gc.ca

Indian and Northern Affairs Canada
Ottawa, Ontario K1A 0H4

www.inac.gc.ca

Canada Mortgage and Housing Corporation (CMHC)

www.cmhc-schl.gc.ca

Canadian Heritage

www.pch.gc.ca

Fisheries and Oceans Canada (DFO)

www.dfo-mpo.gc.ca

Health Canada

www.hc-sc.gc.ca

Human Resources Development Canada (HRDC)

www.hrdc-drhc.gc.ca

Industry Canada (Aboriginal Business Canada)

www.abc.gc.ca

Justice Canada

www.canada.justice.gc.ca

Natural Resources Canada

www.NRCan-RNCan.gc.ca

Canada Customs and Revenue Agency (Revenue Canada)

www.ccra-adrc.gc.ca

Royal Canadian Mounted Police (RCMP)

www.rcmp-grc.gc.ca

Solicitor General of Canada

www.sgc.gc.ca

Status of Women Canada

www.swc-cfc.gc.ca

Internet Support

NATIONAL ABORIGINAL ORGANIZATIONS

Assembly of First Nations (AFN) www.afn.ca

Congress of Aboriginal Peoples (CAP) www.abo-peoples.org

Metis National Council (MNC) www.sae.ca/mbc/mnc

Inuit Tapirisat of Canada (ITC) www.tapirisat.ca

Aboriginal Canada Portal www.Aboriginalcanada.gc.ca

The Aboriginal Canada Portal provides links to the Web sites of the four national Aboriginal organizations, federal programs and services, and provincial and territorial information.

Bibliography

PUBLISHED SOURCES

Carswell. *Consolidated Native Law Statutes, Regulations and Treaties 2000*. Carswell, Ontario: 1999.

Carver, John. *Boards That Make a Difference*. Jossey-Bass, San Francisco: 1997. 25.

Carver, John and Miriam Mayhew Carver. *Reinventing Your Board: A Step-by-Step Guide to Implementing Policy Governance*. Jossey-Bass, San Francisco: 1997.

Daft, Richard L. *Organization Theory and Design*. Sixth Edition, South-Western College Publishing, Cincinnati: 1998.

Funk and Wagnalls Canadian College Dictionary. Fitzhenry & Whiteside: 1989.

Houle, Cyril O. *Governing Boards: Their Nature and Nurture*. Jossey-Bass, San Francisco: 1989.

Howe, Fisher. *Welcome to the Board: Your Guide to Effective Participation*. Jossey-Bass, San Francisco: 1995. 78.

Imai, Shin. *The 2000 Indian Act and Aboriginal Constitutional Provisions*. Carswell, Ontario: 1999. 14, 192. Section 19, Indian Band Council Procedure Regulations.

Kitsaki Development Corporation. *Roles & Responsibilities of Boards of Directors of Aboriginal Economic Development Organizations*. 1991.

Leighton and Thain. *Making Boards Work: What Directors Must Do to Make Canadian Boards Effective*. McGraw-Hill Canada: 1997. 42-3, 150-51.

Munro, Eve. *Band Councillors: Duties and responsibilities*. First Nations Law (nd, pp. 10-11).

Priest et al. *Directors' Duties in Canada: Managing Risk*. CCH Canadian Limited, North York, Ontario: 1995.

Toronto Stock Exchange, Committee on Corporate Governance. *Where Were the Directors? Guidelines for improved corporate governance in Canada*. Draft report, 1994. 7-9.

Whetten, David A., and Kim S. Cameron. *Developing Management Skills*. Fourth Edition, Addison-Wesley, USA: 1998.

MANUSCRIPT SOURCES

AFN - Canada. "First Nations Governance Handbook: A Resource Guide for Effective Councils." Hunter-Courchene Consulting Group, June 24, 2000 draft.

Canada. "Accountability and Management Assessment Workbook." INAC, September 1997.

"Gender Equality Analysis Policy." INAC, 1999.

"Lands, Revenues and Trusts Review. Phase II, Final Report - First Nations Law." INAC, July, 19, 1989, p. 8.

"Lands, Revenues and Trusts Review. Phase II, Final Report - Powers of Bands and Band Councils." INAC, 1989.

"Study of Accountability Practices from the Perspective of First Nations." Report of the Auditor General of Canada, Chapter 13, September 1996.

"The *Indian Act*: Evolution, Overview and Options for Amendment and Transition." John Giokas, Final Report, 1995.

Metepenagiag Bank First Nation. "Fiscal Planning Calendar (ver. 1.0)." 1999.

Ontario. "Municipal Councillors Manual." Ministry of Municipal Affairs, January 1992.

Union of British Columbia Municipalities. "Decision Making in Local Government: Individuals Acting Together." Seminar #4, Richmond, B.C., February 2000.

West Moberly First Nation. "Roles and Responsibilities Workshop." February, 2000.

Court Cases Cited

Bone v. Sioux Valley Indian Band, 1996, 3 CNLR 54 (Fed. T.D.)

Gabriel v. Canatonquin [1980] 2 F.C. 792, [1981] 4 CNLR 61 (Fed. C.A.).

Isaac v. Davey, 51 D.L.R. p. 183.

Williams Lake Indian Band v. Abbey (1992), (sub nom. *Gilbert v. Abbey*) [1992] 4 CNLR 21, [1992] B.C. W.L.D. 1783 (B.C. S.C.)



